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WISCONSIN REPORTS

96

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

APRIL 30—JUNE 24, 1897

FREDERIC K. CONOVER
OFFICIAL REPORTER

CHICAGO
CALLAGHAN AND COMPANY
1898

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

JOHN B. CASSODAY,
Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
SILAS U. PINNEY,
ALFRED W. NEWMAN,
ROUJET D. MARSHALL.

Attorney General, - WILLIAM H. MYLREA.

Clerk, - - - CLARENCE KELLOGG.

MEMORANDA.

Mr. Chief Justice CASSODAY took no part in the decision of those cases in which the opinions were filed June 24, 1897.

This volume contains all cases which were finally determined and in which opinions were filed prior to September, 1897. The delay in its appearance has been caused by the continued ill-health of the official reporter. Volume 97 is now in press, and it is hoped that the succeeding volumes will be issued at short intervals.

ERRORS NOTED IN PREVIOUS VOLUMES.

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On page 98 the statements as to the attorneys for the respective parties should read as follows:

For the plaintiff there was a brief by *Brown & Pradt*, and oral argument by *Neal Brown*.

For the defendant *Paff* the cause was submitted on the brief of *Silverthorn, Hurley, Ryan & Jones*.

For the defendant *Lemke* the cause was submitted on the brief of *Mylrea, Marchetti & Bird*.

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CASES DETERMINED

AT THE

January Term, 1897.

THE STATE VS. SHOVE.

January 19 — April 30, 1897.

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Criminal law: Banks and banking: Receiving deposits when insolvent: Time certificates: Evidence of insolvency.

1. Although a certificate of deposit is issued for money received by a bank, providing that it shall be payable one year after date with interest and shall not be subject to check, the money is nevertheless received "on deposit," within the meaning of sec. 4541, R. S., making it an offense for any officer of a bank to accept or receive money on deposit when he knows, or has good reason to know, that the bank is unsafe or insolvent.
2. The mere fact that a portion of the deposit in such a case consisted of a prior certificate held against the same bank, which was surrendered at the time, did not make the transaction essentially different from what it would have been had the whole amount been deposited in cash.
3. To prove the insolvency of a bank at the time of receiving a deposit it was proper to show the amount of deposits in the bank, including those for which time certificates not yet due had been issued, and to show, also, the other indebtedness of debtors of the bank, and the value of their commercial paper held by the bank as part of its assets.

EXCEPTIONS from the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Exceptions overruled.*

This action comes up on alleged exceptions filed by the defendant, pursuant to sec. 4720, R. S. These exceptions are

stated in narrative form, signed by the presiding circuit judge, accompanied by a certificate of the clerk of the court, and are to the following effect:

On April 10, 1896, the defendant was convicted, under sec. 4541, R. S., of the offense of receiving on deposit $300, April 11, 1892, at Manitowoc, and said defendant being aggrieved by certain opinions and directions of the court upon the trial in certain matters of law, and having alleged exceptions thereto, and it appearing to the court that such exceptions are material, and not frivolous nor intended for delay, which exceptions having been reduced to writing, and presented to the court during the term at which said cause was tried, and being found conformable to the truth in the case, are allowed and signed by the circuit judge presiding at such trial. Such exceptions are as follows, to wit:

The information charged the offense substantially as follows: "That on the 11th day of April, 1892, at said county, *Theodore C. Shove* did fraudulently and feloniously accept and receive on deposit from Hattie J. Glye the sum of $300, good and lawful money of the United States, and being then and there of the value of $300, and being then and there the property of said Hattie J. Glye, and that he, the said *Shove*, at the time he so took and accepted said money on deposit in said bank, then and there knew, or had good reason to know, that the said T. C. Shove Banking Company was unsafe and insolvent and had been unsafe and insolvent for a long time prior thereto; and that the T. C. Shove Banking Company was then and there insolvent." It was further charged in the information that the T. C. Shove Banking Company was a domestic corporation, engaged in banking at Manitowoc; that said *Shove* was the president of such banking company, and the manager thereof, and was a director and stockholder in said bank.

Upon the trial the state was permitted to prove and offered in evidence the following facts: First. That April

11, 1892, Hattie J. Glye came into the T. C. Shove Banking Company's office, at Manitowoc, with a certificate of deposit theretofore issued by said banking company to her for the sum of $200, upon which was due $10 interest, which said certificate of deposit was on that day due; that said Glye surrendered said certificate, upon which was then due $210, principal and interest, to Fred H. Harris, the cashier of said bank, and also gave such cashier $90 in cash, and took a certificate of deposit of said bank for $300, which is dated April 11, 1892, and is to the effect that said Glye had deposited in that bank $300, payable to the order of herself on the return of the certificate "one year after date, with interest at the rate of 5% per annum," and that such deposit was not subject to check. It also appeared in evidence that the defendant was at the time aforesaid, and had been for a long time prior thereto, the president and manager of said bank; that, at the time of the transaction above stated, he was in the banking office of said bank, but it did not appear in evidence that he personally knew of the said transaction at the time. The foregoing is all the evidence offered by the state of the deposit alleged in the information,— to all of which the defendant objected as incompetent and immaterial, for the reason that the transaction did not amount to a deposit, within the meaning of sec. 4541, R. S., but was a loan, and the evidence does not tend to show the commission of any offense by the defendant under the charge made, which objections were then overruled, and the defendant duly excepted.

The state was also allowed to put in evidence that April 11, 1892, there were deposited in said bank demand deposits, subject to check, for the sum of $113,918.34, also time certificates of deposit amounting to $308,627.09, of which there were due April 11, 1892, $8,023, and would become due on or before August 11, 1892, $93,504, and demand certificates amounting to $63,000, to which evidence the defendant ob-

jected as incompetent and immaterial, which objection was overruled, and the defendant excepted. It also appeared from the evidence that of the certificates of deposit that were due April 11, 1892, no demand had been made for the payment of any of them. For the purpose of showing the insolvency of the bank at or about the time alleged in the information, the state was permitted to put in evidence and show the indebtedness of one of the debtors of the bank other than those hereinafter mentioned, and due April 11, 1892; that one of said debtors was indebted to other persons than the bank to the amount of $13,000; that Jacob Fliegler owed the bank April 11, 1892, $86,000; that the Manitowoc Manufacturing Company owed the bank April 11, 1892, $206,000; that Albert Landreth owed the bank April 11, 1892, $13,000; that the Albert Landreth Seed Company owed the bank at said time $19,000; that F. H. Haley owed the bank $26,000,— a part of which said indebtedness of each of said named parties was evidenced by their commercial paper in the usual form, and a part in the nature of overdrafts. The state was permitted to put in evidence testimony of divers witnesses, of Manitowoc, as to the value of the paper of said persons and corporations last above named, April 11, 1892, and who testified that they knew the value of said paper, and that, in their opinion, said paper was of little or no value as a bank asset at or prior to April 11, 1892,— to all of which evidence the defendant objected, which said objections were overruled, and the defendant excepted.

The foregoing exceptions were allowed and certified to by the presiding judge in the summary mode as provided by sec. 4720, R. S.

For the plaintiff there was a brief by the *Attorney General* and *John L. Erdall*, Assistant Attorney General, and a separate brief and oral argument by *A. J. Schmitz*, assistant district attorney, and the *Attorney General.*

For the defendant there was a brief by *F. A. Gilman*, *Benj. M. Goldberg*, and *Chas. W. Felker*, and oral argument by *Mr. Gilman* and *Mr. Goldberg*. They contended, *inter alia*, that the transaction in question was not a deposit but a loan, the certificate being in effect a promissory note. *Catlin v. Savings Bank*, 7 Conn. 495, 496; Standard Dict. "Deposit;" Bouvier, Law Dict.; *Klauber v. Biggerstaff*, 47 Wis. 551, 554; *Curran v. Witter*, 68 id. 16, 19, 20; *Curtis v. Leavitt*, 15 N. Y. 9, 263; *Leavitt v. Palmer*, 3 id. 19, 34; *Smith v. Strong*, 2 Hill, 241, 242; *Payne v. Gardiner*, 29 N. Y. 146, 167; *Bank of Peru v. Farnsworth*, 18 Ill. 563–565; *Barnes v. Ontario Bank*, 19 N. Y. 161; *Downey v. Hicks*, 14 How. 240; *Lansing v. Wood*, 57 Mich. 201, 209, 210; *Cate v. Patterson*, 25 id. 191–194; *Burrows v. Bangs*, 34 id. 304; *Tripp v. Curtenius*, 36 id. 494, 496; *Brummagim v. Tallant*, 29 Cal. 503; *Poorman v. Mills & Co.* 35 id. 118, 120; *McMillan v. Richards*, 9 id. 365, 418; *Kirkwood v. First Nat. Bank*, 24 L. R. A. 444; *First Nat. Bank v. Security Nat. Bank*, 15 id. 386; *Bear's Appeal*, 4 id. 609, 611; *Cassidy v. First Nat. Bank*, 30 Minn. 86; *Pardee v. Fish*, 60 N. Y. 265, 268, 270; *Munger v. Albany City Nat. Bank*, 85 id. 580. As to what constitutes insolvency and the manner of showing it, see *Daniels v. Palmer*, 35 Minn. 348, 349; *Bell v. Ellis*, 33 Cal. 625; *Toof v. Martin*, 13 Wall. 46–48; *Dutcher v. Wright*, 94 U. S. 557; *Buchanan v. Smith*, 16 Wall. 308; *Dodge v. Mastin*, 17 Fed. Rep. 665; *Akers v. Rowan*, 10 L. R. A. 714; *McKown v. Furgason*, 47 Iowa, 637; 37 Cent. L. J. 147; *State v. Sattley*, 131 Mo. 464.

The following opinion was filed February 23, 1897:

CASSODAY, C. J. The defendant was, at the time in question, the president, manager, director, and stockholder of the "T. C. Shove Banking Company." As such, he was convicted of having received on deposit April 11, 1892, the $300 mentioned, contrary to sec. 4541, R. S. Eliminating from

that section what is not applicable here, and it declares, in effect, that "any officer, director, stockholder, . . . manager, . . . or agent of any bank, . . . *who shall accept or receive on deposit, or for safe-keeping, or to loan,* from any person, any money, or any bills, notes, or other paper circulating as money, or any notes, drafts, bills of exchange, bank checks or other commercial paper *for safe-keeping or for collection, when he knows, or has good reason to know,* that such bank . . . *is unsafe or insolvent,* shall be punished by imprisonment," etc. The constitutionality of this statute has been repeatedly sustained by this court, and its validity is not now challenged. *Baker v. State*, 54 Wis. 368; *In re Koetting*, 90 Wis. 166.

1. The principal contention of counsel for the defendant is to the effect that the certificate reciting that Hattie J. Glye had "deposited" in the bank $300, payable *one year* from the date thereof, and then with interest, and not subject to check, made the transaction a loan, and not a deposit, and hence not within the condemnation of the statute. The argument is that the bank simply borrowed the money and gave its promissory note therefor, due in one year from date, and therefore did not accept or receive the money on deposit, nor for safe-keeping, nor to loan, nor for collection, within the meaning of the statute.

We assume that the bank had authority, as incident to its necessary powers to carry on such business, to issue such time certificates. S. & B. Ann. Stats. sec. 2024, subsec. 21; *Rockwell v. Elkhorn Bank*, 13 Wis. 653; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120; *Curtis v. Leavitt*, 15 N. Y. 9, 295, subd. 5. In construing the statute in question, this court has, among other things, said: "The manifest object of the statute in question was to suppress the business of banking or brokerage by any insolvent person, company, or corporation. It therefore inflicts punishment upon persons so engaged, knowing the fact. . . . A bank implies capi-

tal, and capital invites confidence. A man holding himself out as a banker or broker thereby gives public proclamation that he has money, and property readily converted into money, in his possession and subject to his control, and for that reason he may be safely trusted. . . . For an insolvent banker, company, or corporation to continue the business of banking is to hold out assurances of responsibility and surplus capital where neither exists. To do so knowingly is to secure the confidence, and hence obtain the money, of the ignorant and unwary by an implied deception. It is the old story of securing the victim by a display of false colors. To suppress this mischief, to save the public from being induced to deposit money with such insolvent by the implied assurance of responsibility and wealth essential to the business, when they do not in fact exist, was the evident purpose of this statute." *Baker v. State*, 54 Wis. 376, 377. These views have been expressly sanctioned in *Meadowcroft v. People*, 163 Ill. 56. Judge JENKINS has expressed similar views in *In re Cook*, 49 Fed. Rep. 842; *S. C. Cook v. Hart*, 146 U. S. 183. As said by Mr. Justice WINSLOW in a recent case: "The offense consists in receiving deposits in a bank in fact insolvent, and which the person receiving the deposit knew, or had good reason to know, was insolvent." *In re Koetting*, 90 Wis. 171.

Money deposited in a bank is, in law, a loan by the customer to the bank. *Sims v. Bond*, 2 Nev. & M. 608; *S. C.* 5 Barn. & Adol. 389. "All deposits made with bankers may be divided in two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter, and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any

part thereof, on demand." *Marine Bank v. Fulton Bank*, 2 Wall. 256. See, also, *Planters' Bank v. Union Bank*, 16 Wall. 483; *Oulton v. Savings Inst.* 17 Wall. 109; *Commercial Bank v. Armstrong*, 148 U. S. 59. Ordinarily, the money so accepted or received by such bank or banker is accepted or received on deposit. In order to make the section broad enough to cover every case where money is so accepted or received by a person so engaged in the business of banking when he knows, or has good reason to know, that such bank or banker is unsafe or insolvent, there were added to the words "on deposit" the words "or for safe-keeping, or to loan," together with the other words mentioned, including the words "or for collection," as stated. The purpose of the section, therefore, seems to be to punish every person engaged in the business of banking who, knowing, or having good reason to know, that such bank or banker is unsafe or insolvent, nevertheless accepts or receives money in such business, either "on deposit, or for safe-keeping, or to loan," or accepts or receives such paper "for collection." These four purposes accompanying such acceptance or receipt of money or commercial paper for collection would seem to be sufficiently broad and general to include every purpose for which the bank or banker could accept or receive money or commercial paper for collection. If making the certificate of deposit payable in one year takes the case out of the statute, then making such certificate payable in a month or a week or a single day would also take a case out of the statute. As short-time certificates are, ordinarily, as acceptable to customers as certificates payable on demand, it is obvious that an insolvent banker or officer of an insolvent bank, with full knowledge of such insolvency, might, by issuing such time certificates, continue such business indefinitely, without committing the offense prescribed in the statute, unless it is construed so as to cover deposits upon which such time certificates are issued, as well as those pay-

able on demand. "Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in the case of necessity or the absolute intractability of the language used." *Salmon v. Duncombe*, 11 App. Cas. 627. "In construing statutes, the usual and proper mode is to ascertain the intention of the legislature from the language they have used, connected with the state of the law on the same subject anterior to the passage of the statute. When the courts know for what particular mischief the legislature intended to provide a remedy, it is their duty so to construe the statute as most effectually to suppress the mischief and advance the remedy." *Coster v. Lorillard*, 14 Wend. 297. "Even penal statutes are not to be construed so strictly as to defeat the obvious intention of the legislature." *U. S. v. Wiltberger*, 5 Wheat. 76; *Manitowoc Co. v. Truman*, 91 Wis. 12. See, also, *U. S. v. Freeman*, 3 How. 564, 565; *U. S. v. Saunders*, 22 Wall. 492. While a certificate of deposit payable at a fixed time in the future may technically be regarded as a loan and not a mere deposit, yet, in view of the obvious purpose of this statute, we are constrained to hold that the transaction in question was a deposit within the meaning of the statute.

2. The mere fact that a portion of the $300 consisted of a certificate of deposit held against the same bank, and the accrued interest thereon, which was surrendered at the time, did not make the transaction essentially different from what it would have been had the whole amount of $300 been deposited in cash, as recited in the certificate. The cash was present, or supposed to be present, in the bank, and was considered and treated the same as though the cashier had actually passed it over to Glye and she had immediately redeposited the same in the bank.

3. We perceive no error in the method of proving the insolvency of the bank at the time of receiving the money and

issuing the certificate of deposit in question; and that is so whether by such insolvency is meant inability to pay its debts in the ordinary course of business, or merely inability to pay in full at some future time, upon ultimately winding up its affairs. The evidence was certainly material, and relevant and pertinent to the issue on trial, and hence competent.

By the Court.— The several exceptions certified to this court pursuant to sec. 4720, R. S., are each and all overruled.

A motion for a rehearing was denied April 30, 1897.

The authorities as to criminal liability for receiving a deposit into a bank when insolvent are reviewed in a note to *Comm. v. Junkin* (170 Pa. St. 194), in 31 L. R. A. 124. Later cases on the same question are *Meadowcroft v. People*, 163 Ill. 56, 35 L. R. A. 176; and *State v. Beach* (Ind.), 36 L. R. A. 179.— REP.

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JOHN V. FARWELL COMPANY, Respondent, vs. WOLF and others, Appellants.

February 3 — April 30, 1897.

Corporations: Ultra vires: *Who may object: Assignment of causes of action: Conspiracy to defraud: Measure of damages: Immaterial error: Taxation of costs: Interest.*

1. A corporation organized for the purpose of carrying on a general dry goods business is not authorized to purchase the claims of others for damages growing out of a conspiracy to defraud such others and itself, where such purchase is not necessary to preserve its own property or protect its legitimate interests.
2. If a corporation purchases, pays for, and takes an assignment of a cause of action respecting matters outside the purposes of its creation and not authorized by its charter, in any action to enforce such cause of action want of corporate power to engage in such business cannot be interposed as a defense.

3. A cause of action for damages growing out of a conspiracy to defraud by purchasing and disposing of goods without paying for them is not one for damages done to personal estate, within the meaning of sec. 4253, R. S. (providing that "actions for damages done to real and personal estates" shall survive), and is not assignable. 96 10 117 217

4. In an action to recover damages for a conspiracy to defraud by purchasing and disposing of goods without paying for them the measure of damages is the value of the goods at the place where and the time when they were obtained, with interest from that time; but an instruction in such a case that the purchase price, with interest from the commencement of the action, was the measure of plaintiff's recovery was not an error prejudicial to defendants, where it appeared beyond dispute that the goods were worth the purchase price.

5. The taxation of costs will not be disturbed on appeal because of the inclusion of certain items claimed to have been incurred in establishing liability on alleged assigned claims which the appellate court holds not assignable, where substantially all such evidence was proper to establish plaintiff's own original claim upon which it recovers.

6. Interest upon the amount of a recovery, though added to the costs under sec. 2922, R. S., forms no part of the costs; and where, on reversal of a judgment in his favor, plaintiff is authorized to take judgment for a smaller amount with the costs theretofore taxed, such judgment should include interest only upon the amount so authorized.

APPEAL from a judgment of the circuit court for Juneau county: O. B. WYMAN, Circuit Judge. *Reversed.*

Action to recover damages for an alleged conspiracy to defraud. The complaint sets forth, in substance, that in the summer of 1893 defendants entered into a fraudulent conspiracy to defraud wholesale dealers in goods, wares, and merchandise; that the scheme agreed upon was that defendant *Moses Josephson* should purchase goods of such dealers on credit, without any intention of paying for the same, have the same delivered at his store in New Lisbon, Wisconsin, and that the same should then be sold, conveyed away, and concealed in such a way that the proceeds might be divided between the co-conspirators; that pursuant to such

conspiracy, in August and September, 1893, goods, wares, and merchandise to the amount of $434.83 were purchased of plaintiff in the name of said *Josephson*, were delivered to him, and disposed of for the benefit of the defendants pursuant to the aforesaid fraudulent scheme; that no part of such goods has been paid for, and that by reason of the facts plaintiff has been damaged in the said sum of $434.83 and interest; that, further, in pursuance of said fraudulent conspiracy, goods, wares, and merchandise were at various times during the year 1893, particularly stated, purchased of some twenty-four different persons, copartnerships, and corporations, the name of each being given, with the amount purchased; that all of such goods were delivered to said *Josephson*, and disposed of for the benefit of the defendants pursuant to the aforesaid fraudulent scheme, no part of which has been paid for, to the damage of the sellers to the amount of their respective sales and interest; that before the commencement of this action such sellers, for a valuable consideration to them respectively paid, sold, assigned, and conveyed to plaintiff their respective claims for goods so sold and delivered, together with their respective causes of action for damages against defendants on account of the aforesaid conspiracy. The aggregate of plaintiff's claim for damages for goods procured of it pursuant to the aforesaid fraudulent scheme, and of the several other claims mentioned, amounted to $5,102.32, for which sum judgment was demanded, with interest. The defendants, except *Josephson*, joined in an answer to the complaint.

The result of the trial was that the jury found for the plaintiff on all the issues, and assessed the damages at the full amount claimed, which, with interest, made $5,432.25. Proceedings were duly had on the trial, and subsequent thereto, requisite to preserve for review the questions discussed in the opinion. Judgment was rendered on the verdict, and defendants appealed.

For the appellants there were briefs by *Blum & Blum*,

attorneys, and *J. M. Morrow*, of counsel, and oral argument by *Mr. Morrow*.

For the respondent there was a brief by *Lewis & Briggs* and *J. J. Hughes*, and oral argument by *H. M. Lewis*.

The following opinion was filed February 23, 1897:

MARSHALL, J. The record shows that plaintiff is a corporation organized for the purpose of carrying on a general dry goods business. The point was raised on the trial, and preserved for review, that it did not possess power to acquire by assignment claims for damages in no way connected with its own affairs, growing out of the alleged conspiracy to defraud. It does not appear that such claims were in any way necessary to the preservation or enforcement of plaintiff's original claim, or that such purchase was to effect in any way the purposes of its organization, so as to bring its action in that regard within the rules that a corporation may, to preserve its own property and protect its legitimate interests, acquire and enforce liens which would otherwise be outside of the purposes of its organization. A corporation has only such powers as its organic act, charter, or articles of organization confer. This is elementary, but it includes such powers as are reasonably necessary to effect all the general purposes of the corporate creation, though not particularly specified in its charter, unless prohibited thereby or by some law of the state. From the foregoing, without further discussion, we must hold that plaintiff had no authority to acquire by purchase the various claims for damages on which a recovery was had. But it by no means follows that its want of power can be taken advantage of by the defendants in this action. Formerly want of corporate power was an effective weapon, both for defense and attack, in the hands of private parties; but, without any change whatever respecting the general doctrine of *ultra vires* as applied to the acts of corporations acting outside the purposes of their creation, there has been

a gradual development in the direction of holding that none but a person directly interested in the corporation, or the state, can question such authority. Such development from the rigorous rule which anciently obtained was manifested earliest in the adoption of the rule that, where a corporation has violated its charter in the purchase and acquirement of real estate, its title thereto and right to enjoy the same cannot be inquired into collaterally in actions between private parties or between the corporation and private parties;—that it can be questioned only by the state. *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 544; *Alexander v. Tolleston Club*, 110 Ill. 65; *Fritts v. Palmer*, 132 U. S. 282; *Runyan v. Coster's Lessee*, 14 Pet. 122; *National Bank v. Whiting*, 103 U. S. 99; *Shewalter v. Pirner*, 55 Mo. 218; *Ragan v. McElroy*, 98 Mo. 349; *National Bank v. Matthews*, 98 U. S. 621. In the latter case the supreme court of the United States, reversing the supreme court of the state of Missouri, laid down the rule that, "where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object;" that "it is valid until assailed by a direct proceeding instituted for that purpose" by the government; and, further, in effect, that the danger of a judgment of ouster and dissolution is the only check to prevent and punish violations of corporate charters. If the question were respecting the right of a private person to challenge corporate action concerning the acquirement or enjoyment of lands without authority in the charter so to do, it would be deemed so well settled that no such right exists as not to be open to serious discussion; but whether the same rule governs generally is not so clear.

An extended discussion of the subject, showing the process of development in the application of such rule, would be interesting and instructive, but not necessary for the purposes of this opinion. Therefore we content ourselves with referring to a few well-considered cases, showing the present

state of the law respecting the subject, which Thompson, in his work on Corporations, very properly refers to as a "new and growing doctrine." In *Prescott Nat. Bank v. Butler*, 157 Mass. 548, an action between the bank and a private person, the question was raised of whether the action of the former in purchasing notes in the open market as a commodity was *ultra vires;* and in respect thereto the court said, in effect, that if such a purchase be *ultra vires*, it is not made penal or expressly prohibited; therefore the violation of law could be remedied only in proceedings against the bank, in the name of the state, to deprive it of its charter. In *Grant v. Henry Clay C. Co.* 80 Pa. St. 208, where the question was whether the corporation could purchase or hold leases of mining lands, the court, in deciding such question, said, in effect, that if the commonwealth is interested in such an inquiry, it must be made by the proper officer; that the question was of a public nature, concerning solely the sovereignty of the state, and not one that in any way concerned private parties. In *Martindale v. K. C., St. J. & C. B. R. Co.* 60 Mo. 508, the question was whether the defendant had violated statutory requirements, and the court laid down the broad doctrine that collateral inquiry by a private citizen into the supposed illegal acts of a corporation is not permitted in any case, unless expressly so provided by statute. To the same effect are *Kinealy v. St. L., K. C. & N. R. Co.* 69 Mo. 658, and *Hovelman v. Kansas City H. R. Co.* 79 Mo. 632. In *Baker v. N. W. G. L. Co.* 36 Minn. 185, the question was whether the purchase and enforcement of certain mortgage liens was in excess of the corporate authority. *Held*, that none but the state or a stockholder could raise the question.

If the position that the principle under discussion is now, in most jurisdictions, recognized as one of general application, except in respect to contracts wholly executory, required further support, resort might be had to many other

adjudications of the highest respectability, though authorities there are which still adhere to the old rule that a corporate act in excess of its power, either because outside of the purposes of the corporation or because prohibited by statute, is *ultra vires*, and cannot be enforced in any action in any court of justice, without regard to whether such act be challenged by the public or by a private person. Such authorities are exceptional. Judge Thompson, in his valuable treatise on the Law of Corporations (volume 5), commenting on the subject (secs. 6033–6038), appears to deprecate the prevalence of the "new doctrine," and to argue against its further extension, upon the ground that it practically destroys the effect of the doctrine of *ultra vires*, as applied to the unauthorized exercise of corporate power; but the learned author is manifestly in error in that respect. Such doctrine, notwithstanding the limitation which modern development has placed on the means by which it may be called into use, still exists, and may and will continue to exist, adapted as fully as ever to restrain the abuse of corporate franchises and authority, and to punish such abuse whenever the state, in its sovereign capacity, sees fit to exercise it. That such doctrine cannot be resorted to as a weapon for attack and defense in the hands of mere private persons, and used as a ready means of embarrassing business operations by and with corporate bodies, which directly or indirectly touch and administer to human desires at every turn of the individual in modern life, while its effectiveness for all essential purposes of restraint and punishment is fully preserved, furnishes no cause for regret, but rather cause for gratification at the evidence of how certainly principles, by natural growth and development, adapt the law and its administration to the ever-changing needs of advancing civilization, so as best to promote justice and the common welfare. When a corporation offends against the law of its creation, such offense is against the sovereignty of the state;

hence it is most proper that the state should apply the remedy and be charged with the sole responsibility in that regard, and such is the law by the trend of modern authorities, which we approve. This does not hold but that a person directly interested as a stockholder may, in a proper case, interfere, or but that the court may refuse on its own motion, or the objection of a private person, to aid a corporation to enforce, or protect it from the effect of, a contract wholly executory, when outside the purposes of the corporate organization.

In accordance with the foregoing, we hold that if a corporation purchases, pays for, and takes an assignment of a cause of action respecting matters outside the purposes of its creation and not authorized by its charter, in any action to enforce such cause of action want of corporate power to engage in such business cannot be interposed as a defense.

The further point is made that the several alleged assigned claims for damages were not assignable; therefore that the recovery thereon cannot be sustained. Applying the usual test of assignability,—that is, whether the claims are such as survive to the personal representatives,—we start with the presumption that it will not be seriously contended that such claims survive at common law. To be sure, counsel cite various adjudications to show that claims for injuries to personal property do so survive, but they have no application to this case. This is not a claim for injury to personal property as such. At most it is only an injury to a property right. *Webber v. Quaw*, 46 Wis. 118, and *McArthur v. G. B. & M. C. Co.* 34 Wis. 139, are confidently referred to, but they are cases of injuries to property, strictly so called, and follow the New York authorities respecting the assignability of such claims.

In most states, as here, there is a statutory extension of the common-law rules, and authorities are very numerous respecting the subject, many of which, however, have very

little application to this case because of statutory differences. The New York statute provides that "actions for all wrongs done to the property rights or interests of another shall survive." It is held that this language is so broad and comprehensive as to cover all injuries to rights of property, and is not confined to injuries to property as such;—that it includes actions for damages for conspiracies to defraud and damages for deceit. *Bond v. Smith*, 4 Hun, 48; *Haight v. Hayt*, 19 N. Y. 464; *Lyon v. Park*, 111 N. Y. 350; *Brackett v. Griswold*, 103 N. Y. 425. These cases turned entirely on the meaning of the significant words, "property rights and interests." Our own statute (sec. 4253, R. S.), so far as it relates to this subject, is as follows: "Actions for damages done to real and personal estates" shall survive. A similar statute existed in Massachusetts at a very early day, and was adopted from that state by Michigan and this state as well. It received construction in the state of its origin, before adoption here; hence, under a familiar rule, such construction was, in effect, a part of the statute itself at the time it was ingrafted upon and became a part of our system. The whole subject goes back to St. 4 Edw. III, c. 7. Before that, in England, no action for an injury to personal property survived. By such statute, says Mr. Justice PUTNAM, in effect, in *Holmes v. Moore*, 5 Pick. 257, an action for goods carried away survived, and by equitable construction it was held that the remedy for a wrong done to personal property, though such property was not actually carried away, survived, and such statute, with such construction, was adopted by the state of Massachusetts from the English statute. Following *Holmes v. Moore*, in *Read v. Hatch*, 19 Pick. 47, an action for damages for inducing plaintiff, by fraudulent representations respecting the insolvency of another, to sell property to such other, SHAW, C. J., in delivering the opinion of the court, said, in effect, that a fraud injuriously affecting a person's estate is not an injury to such person's personal estate,

within the meaning of the statute; that to hold otherwise would be to give to the statute a forced construction, and not conformable to the intent of its framers; that to uphold such construction would, in effect, be to say that every injury by which one may be prevented from pecuniary gain or subjected to pecuniary loss would, directly or indirectly, be a damage to his personal property. The statute must have a more limited construction, and be confined to damages done to some specific personal estate of which one may be the owner. The mere fraud or cheat by which one sustains a pecuniary loss cannot be regarded as damage done to personal estate. The construction thus given to the statute has never been departed from. See *Cutting v. Tower*, 14 Gray, 183; *Leggate v. Moulton*, 115 Mass. 552; *Brush v. Sweet*, 38 Mich. 574; *Dayton v. Fargo*, 45 Mich. 153.

The only case previously decided in this court that throws any light on the subject is *Murray v. Buell*, 76 Wis. 657, cited by respondent. Though it is in harmony with the foregoing, it did not involve the precise question under discussion. The contention there appears to have been that an action for damages for a conspiracy to injure another's business was assignable as an injury to the person of such other. This court held that it could not be so considered, but was an injury to such other's business interest merely; therefore not assignable. It did not occur to the able counsel who presented the case in this court, or to the present chief justice, who wrote the opinion, that such a cause of action could be held assignable as an injury to personal estate. Therefore the subject was not discussed, though to say, as was in substance said in such opinion, that such a cause of action is for an injury to business interests, therefore not assignable, is quite equivalent to saying that it is an injury to property rights, as distinguished from an injury to specific property, therefore not assignable.

The result of what has been said is that the several as-

signed claims for damages, upon which the plaintiff recovered, did not pass to plaintiff by the attempted assignment thereof, and that such recovery cannot be sustained.

The point is made, based on several exceptions, that the familiar rule that statements made by one conspirator after the abandonment or completion of the conspiracy are not admissible against his co-conspirators, was several times violated during the trial. It is needless to refer to each of such exceptions in detail. Suffice it to say that all have received careful examination without discovering any such violation.

The further point is made that the evidence is insufficient to sustain the finding of the jury respecting the existence of the alleged conspiracy to defraud. We are unable to sustain such contention. There appears to be considerable evidence, circumstantial and otherwise, on the question, from which the jury might legitimately have come to the conclusion which they did; hence we are unable to say that there was any abuse of discretion on the part of the trial judge in denying the motion to set aside the verdict as against the evidence.

The jury was instructed that the measure of plaintiff's recovery, in case of a finding in his favor, should be "the contract price of the goods sold, together with interest from the time of the commencement of the action." That was error. The true rule in such cases is the value of the goods at the place where, and time when, they were obtained from the plaintiff, with interest thereon from such time at the rate of six per cent. per annum. Nevertheless an examination of the record shows that there was no contest on the question of the amount of damages sustained. All the evidence shows that the goods were worth the contract price. The court would have been warranted in instructing the jury, if they found in plaintiff's favor, to assess its damages at a sum equal to the cost price of the goods, with interest. Therefore the error of the court was not prejudicial; hence, in accordance

with a familiar rule, it cannot work a reversal of the judgment.

Some other errors were assigned and discussed in the briefs of counsel, all of which have been considered, but none appear to constitute reversible error, or are of sufficient importance to require special mention in this opinion.

The result of the foregoing is that plaintiff was not entitled to recover on any claim for damages other than that caused by its sale of goods to *Josephson* on and prior to the 16th day of September, 1893, amounting in value to $434.83. Therefore a new trial must be had, unless plaintiff consents to take judgment for such amount, with interest and costs.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial, unless plaintiff elects to take judgment for $434.83 and legal interest thereon from the 16th day of September, 1893, together with the costs of the trial heretofore taxed in the circuit court.

The following opinion was filed April 30, 1897:

MARSHALL, J. The appellants move for a rehearing of this cause on the ground that respondent should not be awarded full costs, taxed in the circuit court, as provided in the decision rendered. Various items of cost are mentioned by appellants' counsel, which are claimed to have been incurred in establishing liability on the alleged assigned claims which the court held were not assignable. Substantially all such evidence was proper to establish the cause of action on respondent's original claim. Therefore we perceive no reason why the taxation of costs should be disturbed for the inclusion of such items.

It is further claimed that the original recovery was $4,997.42 in excess of that sustained in this court; that under sec. 2922, R. S., interest on such excess was added to the costs taxed in the circuit court; and that the general award

of costs, as taxed in such court, carries such interest, which amounts to $125. The answer to such contention is that the interest, while added to the costs under sec. 2922, R. S., is no part of the costs. The judgment of this court allowed interest on $434.83 from September 16, 1893, and no other interest can properly be included in the judgment by way of addition to costs or otherwise.

By the Court. — The motion is denied, with $25 costs.

STREHLOW, by guardian, Respondent, vs. PETTIT and another, Appellants.

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March 16 — April 30, 1897.

Malicious prosecution: Evidence: Arrest: Submission to jurisdiction: Termination of prosecution: Failure to charge an offense: Prosecution instituted to collect a debt: Want of probable cause.

1. In an action for a malicious prosecution claimed to have been instituted for the purpose of collecting a debt, a letter written to the plaintiff a few days before the issuance of a criminal warrant, by the cashier of a bank in behalf and by authority of defendants, requesting her to pay the account in question at once "and save the trouble of taking other steps to collect it," was admissible in evidence.
2. In such action the testimony of plaintiff's brother-in-law that an officer having a warrant for her arrest had requested him to inform her of that fact and that she must appear before a justice of the peace at a certain time, and that he had so informed her, was admissible, in connection with other evidence (showing, among other things, that the warrant had been issued, and that she had so appeared), as tending to prove an arrest; and such evidence is *held* sufficient to sustain a finding that the prosecution against the plaintiff was actually commenced and that in pursuance thereof she submitted herself to the jurisdiction of the justice.
3. Evidence in such case showing, among other things, that when plaintiff appeared before the justice the case was postponed to a certain time; that at that time the plaintiff again appeared, but

no one appeared against her, and the justice said there was nothing on his docket; that the warrant was never returned; and that nothing further was ever done in the matter — is *held* sufficient to sustain a finding that the prosecution was terminated before the action therefor was commenced.

4. It is no defense to an action for malicious prosecution that the complaint made by the prosecutor failed to state any offense and that the warrant issued thereon was void.

5. The mere fact that a criminal prosecution was instituted for the purpose of collecting a debt will not justify a finding that there was a want of probable cause. *Lueck v. Heisler*, 87 Wis. 644, limited and explained.

APPEAL from a judgment of the circuit court for Jefferson county: JOHN R. BENNETT, Circuit Judge. *Reversed.*

On April 5, 1894, the defendant *Pettit*, being duly sworn and examined on oath before H. A. Porter, a justice of the peace, made complaint to the effect that the plaintiff, *Laura Strehlow*, did, at Ft. Atkinson, Jefferson county, March 26, 1894, unlawfully and feloniously embezzle and convert to her own use seven and one quarter yards of dress lace of the value of $2.26, the goods and property of the firm of Pettit & Hoffman, of Ft. Atkinson, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Wisconsin; and prayed that the said *Laura Strehlow* be arrested and dealt with according to law. Such written complaint was subscribed by said *Pettit*, who was sworn and examined before said justice. Thereupon said justice issued his warrant to the sheriff or any constable of said county, reciting the substance of said complaint, and commanding him forthwith to apprehend the said *Laura Strehlow*, and bring her before him to be dealt with according to law.

There is evidence tending to prove that the plaintiff was at the time in question about seventeen years of age; that her parents had both been dead for several years; that she was at the time living with her sister and brother-in-law,

John May; that the criminal warrant so issued was thereupon delivered to the city marshal, Flint, by such justice; that Flint thereupon went with the warrant to the home of *Laura Strehlow* for the purpose of executing it, but, not finding her, he went to the factory where her brother-in-law was employed, and informed him, in substance, that he had a warrant for *Laura*, and asked him to tell her about it, and that she should go to Porter's office at 1 o'clock that day; that the brother-in-law, May, told *Laura* at noon that Flint had a warrant for her, and that she was arrested, and that she was to appear before Justice Porter at 1 o'clock; that she went to Porter's office at 1 o'clock; that the plaintiff, Flint, May, *Pettit*, and the justice, Porter, were all that were at Porter's office at that time; that Porter had a paper in his hand (the bill of lace; at least it was the amount of $2.26); that he asked the plaintiff if she was willing to settle; that she told him she would not settle, that she would not pay any bill that she had not got; that Porter said he would like to have it settled,— to make some settlement; that *Pettit* said he was willing to settle; if she would pay him $7 he would call it settled; that that would pay for the costs; that she told him she would not settle; that May asked for time to write to her guardian; that Porter said he would postpone the case for about ten days, and fixed the date for April 19th; that he said they should appear there at 1 o'clock on that day; that on that day she appeared there, with her guardian and attorney; that no one else was there but the justice; that her attorney asked the justice if there was anything on the docket, and he said there was not; that he asked for the warrant and complaint; that her attorney copied the complaint; that there was nothing done with her that day under the warrant.

The justice testified to the effect that the defendant *Pettit* came to him with the complaint against *Laura;* that he signed and swore to it; that he gave no directions about it;

that he, as such justice, issued the warrant, and gave it to the city marshal, Flint; that he never returned the warrant, and that nothing further was done in his court about it.

On January 7, 1895, the plaintiff, by her guardian, commenced this action for malicious prosecution. The complaint alleged, in effect, the facts stated. The defendants' answer admits the making of the complaint, but alleges that it was made in good faith and without malice, that there was good and probable cause for making the same, and that it was so made on the advice of counsel; that the defendants gave no instructions or directions as to what proceedings should be had thereon; that no arrest of the plaintiff was ever made, or proceedings had in the matter, except that a warrant was issued and delivered by the justice to the marshal. And the answer further contained a general denial of everything not therein admitted.

At the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed her damages at $450. From the judgment entered thereon in favor of the plaintiff, the defendants appeal.

L. B. Caswell and *W. H. Rogers*, for the appellants.

Harlow Pease, for the respondent.

CASSODAY, C. J. We perceive no error in admitting in evidence the letter written three or four days before the issuance of the warrant to the plaintiff by the cashier of the bank, in behalf of the defendants, requesting her to call at the bank, or the store of the defendants, and pay an account of $2.26 at once, "and save the trouble of taking other steps to collect it." There is sufficient evidence tending to prove that the letter was written by the authority of the defendants. The admission of evidence as to the age of the plaintiff, and that her parents were both dead, appears to have been without objection. There was no error in admitting the testimony of the plaintiff's brother-in-law, to

the effect that he told her that Flint had a warrant for her, and that she must appear before the justice, as mentioned in the foregoing statement. It was a circumstance in connection with the other evidence tending to prove that she was arrested. In overruling the objection the court said, in effect, that if the officer told May "to tell *Laura* she must appear at the office, and he did tell her, and she appeared at the office, it is submitting to the jurisdiction of the court." We find no error in this ruling. Counsel for the defendants concede that the proofs tend to show that April 5 or 6, 1894, the plaintiff employed the attorney mentioned, "and with him called at the justice's office, as requested by Flint, and that the plaintiff, by her counsel, thereupon requested that nothing further be done for ten days," in order that matters might be arranged with the parties. The substance of the complaint and warrant in the criminal proceeding is given in the foregoing statement. They may be insufficient to charge the offense of embezzlement prescribed by the statute. S. & B. Ann. Stats. secs. 4418, 4667; *White v. State*, 20 Wis. 233. Whether they were void on their face, and charge no crime of embezzlement, as held by the trial court, or were sufficient to give the justice jurisdiction, and hence subject to amendment before the justice, it is not necessary to determine in this action. This court has expressly held that, "it is no defense to an action for malicious prosecution that the complaint made by the prosecutor failed to state any offense, and that the warrant issued thereon was void." *Lueck v. Heisler*, 87 Wis. 644; *Beuthner v. Ellinger*, 90 Wis. 439. This is in harmony with the ruling of the English courts. *Wicks v. Fentham*, 4 Term, 247; *Pippet v. Hearn*, 5 Barn. & Ald. 634.

We think the evidence is sufficient to sustain a finding to the effect that the prosecution against the plaintiff was actually commenced, and that in the pursuance thereof she submitted herself to the jurisdiction of the justice. The evi-

dence is also sufficient to sustain the finding to the effect that such prosecution had terminated before the commencement of this action, within the decisions of this court. *Woodworth v. Mills*, 61 Wis. 44; *King v. Johnston*, 81 Wis. 578; *Lawrence v. Cleary*, 88 Wis. 473. These principles of law, and the sufficiency of the evidence mentioned, dispose of several of the errors assigned.

There are seventeen assignments of error for refusing to charge the jury. Several of them are overruled upon the principles already stated. Several of them relate to a single isolated feature of the case, having its significance in connection with other evidence and circumstances in the case, and hence were properly refused. Such isolated facts or items of evidence could not properly be thus eliminated from the case, as a matter of law, by the trial court. The court properly charged the jury to the effect that the plaintiff must prove, in order to maintain this action, that the prosecution was instituted by the defendants maliciously and without probable cause; that both of these facts must concur; that the want of probable cause is a material averment and, though negative in its character, must be proved by some affirmative evidence, unless the defendants dispense with the proof by pleading the truth of the facts involved in the action; that it is independent of malicious motive and cannot be inferred as a necessary consequence from any degree of malice that may be shown (Newell, Mal. Pros. 246, § 12; 14 Am. & Eng. Ency. of Law, 17); and that both questions were questions of fact to be determined by the jury from the evidence given on the trial. In another connection the court, after charging the jury to the effect that, if a prosecutor fully and truly states the facts of which he complains to some one learned in the law and admitted to practice in the courts of record of the state, and is advised by him that such facts constitute a criminal offense, for which he then prosecutes, such counsel drawing the complaint for the crime

accordingly, the prosecutor and attorney both acting in good faith,— this state of facts makes out a case of probable cause and a complete defense to the action, added these words: "That is, where neither the attorney in such case nor the party sets on foot the prosecution to collect a debt. If the prosecution in such case is instituted, notwithstanding the advice of counsel, for the purpose of collecting a debt, that would be, as I have once before stated to you, a malicious prosecution." And in another portion of the charge the jury were told that: "But here again I will state that, if the main object in setting on foot a criminal prosecution is to collect a debt against the party thus prosecuted, the advice of counsel learned in the law will not constitute any defense to an action for malicious prosecution. The use of criminal proceedings to collect a debt against the party prosecuted is wholly unjustifiable, and its use for such purpose is malicious prosecution."

The learned trial judge may, as suggested by counsel on the argument, have been misled into so charging the jury by some things inadvertently said in *Lueck v. Heisler*, 87 Wis. 644. That case was correctly decided. As there, in effect, held, a criminal prosecution for the purpose of collecting a debt, or to secure some other private or ulterior benefit, is evidence of malice, and may, in certain cases, be conclusive. *Spain v. Howe*, 25 Wis. 625; *Magmer v. Renk*, 65 Wis. 364. But such prosecution for such purpose, though malicious, does not of itself constitute malicious prosecution. To be malicious prosecution, it must be without probable cause. Malice may be inferred from a want of probable cause. Newell, Mal. Pros. 240, 247, §§ 10, 13, 14. As to what, in a legal sense, constitutes malice, is a question of law for the court; "but the question of the existence of the circumstances which go to make up the essential elements of malice in a particular case is purely a question of fact, and is for the jury to determine." Id. § 15. The same learned author says: "Malice

may be inferred by the jury from a want of probable cause, but the want of probable cause cannot be inferred from any degree of express malice." Id. 265, § 3. Another authority declares that "while juries may find malice from the facts that establish want of probable cause, the most express malice is not evidence of want of probable cause." 14 Am. & Eng. Ency. of Law, 64. In the same book it is stated: "Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. Such facts and circumstances must not only exist, but the defendant must have believed in the guilt of the plaintiff." Id. 24, 26. And again: "It is stated broadly in many cases that a plaintiff who, after consulting counsel in good standing, and fully disclosing the facts of his case within his knowledge, acts upon the advice of such counsel, is not liable in a suit for malicious prosecution for bringing such action. This is so because it disproves malice and shows probable cause." Id. 53–55. This court has held that the only difference in "express malice" and "implied malice" is in the mode of proving the same. *Wilson v. Noonan*, 35 Wis. 352. It follows, from these authorities, that a jury is not justified in finding a want of probable cause from the mere fact that a criminal prosecution has been instituted for the purpose of collecting a debt.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

VAN HORN and others, Appellants, vs. VAN DYKE and others, Respondents.

March 17—April 30, 1897.

Liens: "Principal contractor:" Partnership: Subcontractors.

After making a proposal for the remodeling of a building a firm of contractors was dissolved, and two days later one of the former members made a contract in his own name for said work. Soon after, the same persons formed a new partnership. The owner of the building expressly refused to substitute the new firm as a party to the contract, but it contracted for the materials and labor and performed the contract with his knowledge. *Held*, that the firm was the principal contractor, within the meaning of sec. 3315, S. & B. Ann. Stats., and that persons who, dealing with it as such, furnished materials and performed labor on the building were entitled to subcontractors' liens.

APPEAL from a judgment of the circuit court for Waukesha county: WARHAM PARKS, Circuit Judge. *Reversed.*

The case is stated in the opinion.

For the appellants there was a brief by *Geo. E. Robinson* and *Ryan & Merton*, and oral argument by *Mr. Robinson* and *Mr. E. Merton.*

For the respondent *Van Dyke* there were briefs by *Van Dyke & Van Dyke & Carter*, and oral argument by *W. D. Van Dyke.*

CASSODAY, C. J. This action was commenced August 10, 1895, to enforce liens in favor of mechanics and material men, as subcontractors, respectively, under Edmunds & Dittrich, upon the dwelling house and premises described,—the property of the defendant *John H. Van Dyke, Jr.* Issues being joined and a trial had, the court found, in effect, that September 24, 1894, the defendant *Dittrich* individually entered into a contract, in writing, in his own name, with the defendant *John H. Van Dyke, Jr.*, for the remodeling and

repairing of his said dwelling house; that by the terms of said contract *Dittrich* agreed to furnish all the work, labor, and services, and all material of every kind, to be used in and about the erection, repairing, and remodeling said building according to plans and specifications mentioned, for $2,458.58; that October 15, 1894, the defendants *Edmunds* and *Dittrich* entered into a copartnership as contractors and builders under the firm name of Edmunds & Dittrich; that *Dittrich* requested *Van Dyke* to consent to the substitution of the firm of Edmunds & Dittrich as principal contractors in the place of *Dittrich* under said written contract, but that *Van Dyke* expressly declined and refused to do so, and never consented thereto, never released *Dittrich* from said written contract, and never made any contract with the firm of Edmunds & Dittrich relating to the rebuilding of the dwelling; that October 15, 1894, that firm agreed with *Dittrich* to perform said written contract to rebuild said dwelling, and entered upon the execution thereof, and completed and performed said contract; that the several appellants, respectively, furnished materials to, and did work and labor for, said firm of Edmunds & Dittrich, as such contractor thereunder, in and about the erection, construction, and rebuilding of said dwelling house, to the several amounts as found by the trial court. And as conclusions of law the court found, in effect, that the plaintiffs were severally entitled to judgment against the defendants Edmunds & Dittrich, as such copartners, for the sums set opposite their names, respectively, for such materials furnished and such work and labor done; that *Dittrich*, individually and alone, was at all times the principal contractor with *John H. Van Dyke, Jr.*, for the remodeling and repairing of said dwelling house; that there was no novation or substitution of parties under said contract; that the statutes did not give a mechanic's lien to a subcontractor of a subcontractor; that none of the plaintiffs, as individuals or as

partners, were entitled to any lien upon said premises. From the judgment entered thereon accordingly, dismissing the complaint in so far as it relates to the defendant *John H. Van Dyke, Jr.*, the plaintiffs bring this appeal.

It appears that on and for some time prior to September 22, 1894, the defendants *Edmunds* and *Dittrich* had been in partnership and engaged in the construction of buildings; that as such firm they had, a short time before the day and year last mentioned, sent a proposition to the defendant *John H. Van Dyke, Jr.*, to construct the dwelling house in question; that September 22, 1894, the firm of Edmunds & Dittrich dissolved by mutual consent; that two days thereafter *Dittrich*, in his own name, individually, entered into the written contract with *Van Dyke* for the construction of the dwelling house as found by the court; that five days after that *Edmunds* and *Dittrich* again entered into copartnership for doing such work; that, although *Van Dyke* expressly declined and refused to modify said contract by inserting therein the firm name of Edmunds & Dittrich in place of the individual name of *Julius Dittrich*, still it appears that the firm of Edmunds & Dittrich entered upon and commenced the contracting for materials and labor and the performance of the contract, and did fully perform the contract, with the knowledge of *Van Dyke;* that the materials furnished and the work performed by the several appellants were so furnished and performed by them under contracts made by them, respectively, with that firm as principal contractors; that the several appellants gave to said *Van Dyke* due notice that they, respectively, claimed liens as subcontractors under said firm as principal contractors.

The radical error of the trial court, as it appears to us, consists in holding, in effect, that the firm of Edmunds & Dittrich were not the principal contractors, but subcontractors under *Dittrich*, individually, as the sole and only principal contractor, and hence that the several appellants were

mere subcontractors of subcontractors. Although an action to enforce a lien is statutory, yet it is equitable in its nature. *Willer v. Bergenthal*, 50 Wis. 474; *Weston v. Olsen*, 55 Wis. 613; *Huse v. Washburn*, 59 Wis. 414; *Bentley v. Davidson*, 74 Wis. 420. The purpose of the statutes is to secure payment to those named in the statutes, furnishing materials or performing labor upon the structures therein mentioned. S. & B. Ann. Stats. secs. 3314, 3315. The notice required by subcontractors is to protect both the lot owner and such contractors. Within the purview of the statutes, we must hold that the firm of Edmunds & Dittrich were, in equity and essentially, the principal contractors, notwithstanding the written contract was in the name of only one of the members of that firm individually. Any other construction would defeat the very purpose of the statute, which is to give to "every person who, as subcontractor of a principal contractor, or employee of any contractor or subcontractor, performs any work or labor for, or furnishes any materials to a principal contractor or subcontractor, in any of the cases mentioned in the preceding section, shall be entitled to the lien and remedy given by" the statute in case the same is complied with. S. & B. Ann. Stats. sec. 3315. We must hold that the several appellants establish their respective claims within this provision of the statute.

By the Court.— Those portions of the judgment appealed from are reversed, and the cause is remanded for further proceedings in accordance with this opinion.

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SWAN, Respondent, vs. PORTER, APPELLANT.

March 18 — April 30, 1897.

(1) *Change of venue: Stipulation: Jurisdiction: Waiver.* (2) *Wrongful attachment: Loss of profits.*

1. Under sec. 2622, R. S., the venue of an action cannot be changed, without the consent of the court having jurisdiction, by any mere stipulation of the parties; and the appearance of the parties and a trial without objection in the court to which the cause is so attempted to be removed is not a waiver of the want of jurisdiction in that court.

[2. Whether the owner of wool which had been loaded in cars for shipment under an agreement that an extra price was to be paid if the wool was delivered within a specified time can recover for the loss of such extra price from a person who, by wrongfully attaching the wool as the property of the consignee, prevented its delivery within said time, not determined.]

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Reversed.*

The facts are stated in the opinion.

For the appellant there was a brief by *Chafin & Parkinson*, attorneys, and *G. W. Hazelton*, of counsel, and oral argument by *Mr. Hazelton* and *Mr. E. W. Chafin.*

C. E. Armin, for the respondent.

CASSODAY, C. J. The complaint alleges, in effect, that June 8, 1895, the plaintiff was engaged in buying wool at Mukwonago, and had on hand 15,200 pounds of wool in a car of the Wisconsin Central Railway Company at that place for shipment to the Great Western Fur & Hide Company, of Chicago; that they had agreed with the plaintiff to pay him an extra price therefor, provided the wool should reach them as early as June 10, 1895, so that the same could be used in filling out a large consignment of wool for which the company had contracted; that June 8, 1895, the defendant

swore out a writ of attachment against the Fur & Hide Company, and levied upon and seized the wool, and the plaintiff was thereby prevented from shipping the same until June 12, 1895, which was too late to secure the price the company had agreed to pay the plaintiff, and so he was obliged to sell the same at a loss of $284.18; that the loss was occasioned by the misconduct of the defendant in attaching the wool as the property of the Fur & Hide Company, when in truth and in fact it was the property of the plaintiff solely, as the defendant then and there well knew. The answer admits the attachment, the issuance of the warrant, and the seizure of the wool, but denies each and every other allegation of the complaint. This defendant, as plaintiff in the attachment action, voluntarily withdrew the same and released the wool, June 11, 1895.

At the close of the trial the jury returned a verdict in favor of the plaintiff for $284.18. The defendant moved for a new trial upon several grounds, and, among others, that the damages were excessive. The court thereupon ordered that a new trial be granted in said action, unless the plaintiff would remit from the damages awarded to him the sum of $91.68. The plaintiff then and there remitted from said verdict that amount, and judgment was thereupon entered in favor of the plaintiff for the balance, with costs. From that judgment the defendant brings this appeal.

1. It appears that this action was commenced in the circuit court for Waukesha county, July 5, 1895; that December 11, 1895, the attorneys for the respective parties signed and filed with the clerk a stipulation in said action, to the effect "that this case, together with all the papers and records therein, be transferred to the county court of Waukesha county, there to be placed upon the calendar with civil causes, to be tried at the then present term thereof; that the clerk of this court is hereby requested to transfer all of said papers and records in this case to the county court for

Waukesha county;" that February 6, 1896, the parties appeared in the county court, and stipulated to try the case therein at the March term, without further notice; that March 9, 1896, the clerk of the circuit court transmitted all the papers in the case to the county court pursuant to stipulation, and thereupon the trial was had in the county court at the March term thereof for 1896.

There is no claim that the action was not commenced in the proper county, or the proper court, nor that there was any reason to believe that an impartial trial could not be had in the circuit court, nor that the convenience of witnesses or the ends of justice would be promoted by such change. The contention is that the venue was changed solely by virtue of the stipulation mentioned, and without any order of the court, or the presiding judge, or any judge. The statute applicable declares that: "The *court or the presiding judge thereof* may change the place of trial in the following cases: . . . (4) When the parties or their attorneys shall stipulate in writing to change the place of trial; and, in the last case, the *order may be made by the judge.*" S. & B. Ann. Stats. sec. 2622. Under this section it is very obvious that in a case where the circuit court has the rightful and proper jurisdiction of an action and the parties thereto and the subject matter thereof, the court cannot, *without its consent*, be ousted of such jurisdiction by any mere stipulation of the parties.

The statutes go further, and declare, in effect, that when a change of the place of trial has been ordered by the court, all papers in the case "shall be certified and transmitted by the clerk of the court to the like clerk in the county to which the place of trial is changed, with a statement of his fees therefor and in the action, which shall be paid before the transmission, by the party procuring such change. The change shall be complete on filing the papers transmitted. If such transmission be not made within twenty days from

the making of the order to change the place of trial, . . . such order shall be deemed vacated and no change for the same cause thereafter made." S. & B. Ann. Stats. sec. 2627; *Eldred v. Becker*, 60 Wis. 48; *Holt v. Coleman*, 61 Wis. 422; *Mantz v. Werner*, 64 Wis. 408. Such failure to transmit the papers, however, is an irregularity which may be waived. *Starkweather v. Johnsen*, 66 Wis. 469.

It is contended that the fact that the defendant so stipulated for such change of venue, and then appeared in the county court and tried the cause without objection, was a waiver of any want of jurisdiction. There are cases in which this court has held that want of jurisdiction by reason of a defect in the papers for a change of venue has been waived; but it is believed that in all those cases the court in which the cause was pending, or the judge thereof, consented to surrender such jurisdiction by making an order, or attempting to make an order, to change the venue. The following are illustrations: *Montgomery v. Scott*, 32 Wis. 249; *Carpenter v. Shepardson*, 43 Wis. 406, 412; *Schœffner's Estate*, 45 Wis. 614; *Magmer v. Renk*, 65 Wis. 364. On the other hand, there are numerous cases in this court holding, in effect, that such want of jurisdiction could not be waived by the parties alone. *Dykeman v. Budd*, 3 Wis. 640; *Foster v. Bacon*, 9 Wis. 345; *Hewitt v. Follett*, 51 Wis. 264; *Bullard v. Kuhl*, 54 Wis. 544; *Plano Mfg. Co. v. Rasey*, 69 Wis. 246; *Billings v. Noble*, 75 Wis. 325; *Winnebago Furniture Mfg. Co. v. W. M. R. Co.* 81 Wis. 389; *Vogel v. Antigo*, 81 Wis. 642; *Hager v. Falk*, 82 Wis. 644; *Maher v. Davis & S. Lumber Co.* 86 Wis. 530. In the first of these cases an appeal had been taken from a justice of the peace to the county court at a time when no such appeal could be taken to the circuit court, but causes could be taken from the county court to the circuit court on change of venue. Such being the condition of things, the parties stipulated in writing to the effect that the venue be changed from the county court

to the circuit court, and the judge of the county court was thereby authorized to change the venue accordingly, and that the cause be tried at the next term of the circuit court, and upon filing that stipulation the county court ordered the change according to the stipulation; but it was held that the circuit court got no jurisdiction. In *Bullard v. Kuhl*, 54 Wis. 544, it was held, in effect, that a circuit court having jurisdiction on appeal from a justice to hear the case on the original papers and return could not take jurisdiction to try the cause *de novo*, although the parties stipulated in writing that it should be so tried. We must hold that the cause remained in the circuit court, and that the county court acquired no jurisdiction.

2. It may be a serious question whether the complaint states a cause of action within the principles of law stated in *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214. But, in view of the conclusion reached upon the other question, it becomes unnecessary, if not improper, to consider it here.

By the Court.— The judgment of the county court of Waukesha county is reversed, and the cause is remanded for further proceedings according to law.

F. Dohmen Company (Limited), Respondent, vs. Niagara Fire Insurance Company, Appellant.

March 20 — April 30, 1897.

(1, 2) Change of venue: Transmission of papers: Motion to extend time. (3-5) Evidence: Books of account: Proof of contents. (6-13) Insurance against fire: Court and jury: Instructions: Credibility of witnesses: Fraud avoiding policy: Special verdict.

1. An order for a change of venue, though made pursuant to a stipulation of the parties, is vacated, under sec. 2627, R. S., unless the papers are transmitted within twenty days.

2. A motion in such a case that the clerk be directed to transmit the papers, made after the expiration of the twenty days, not on any ground appealing to the discretion of the court, but on the theory that the order for the change was still in force, could not be treated as a motion for an extension of the time for transmission.

3. The amount of stock on hand in a wholesale mercantile establishment at the time of a fire cannot be shown by testimony as to the contents of the account books showing the purchases and sales since the last inventory, where the witness testifying thereto did not keep the books, and their correctness is not verified in any way, and the books themselves are not in evidence.

4. But where, in such a case, no other definite evidence exists, if the books are reasonably verified as correct records of the daily transactions in the business as the same were regularly reported to the office to be recorded in such books, with proof that the books were relied upon by the proprietors solely as a repository of the facts in regard to the business, and that they were uniformly found to be correctly kept, a witness who has had occasion to refer to them from time to time, and who thereby and through a general knowledge of the business has been convinced of their correctness, may properly testify, by their aid, to their contents as facts, without having personal knowledge of such facts independently of the books, and without ever having had any other knowledge of all the individual transactions than such as might be gained by generally superintending the business.

5. The amount of sales made by an insured after a loss, and the amount of the stock at a certain time after the loss, cannot be proven by the insurer by testimony of an adjuster as to what appears on the books of the insured, the books themselves being the best evidence of their contents.

6. In an action on an insurance policy, where one of the defenses supported by evidence was that plaintiff had destroyed or injured goods, after the fire, to increase the loss, it was error to instruct the jury that whatever damage was done to plaintiff's property was in consequence of the fire.

7. A charge that the jury are not at liberty to reject the testimony of any witness because his statements are in conflict with those of any other witness, is *held* erroneous because it may well have been understood in a sense which would make it an invasion of the province of the jury.

8. A charge that if the jury concluded that any witness knowingly and wilfully testified falsely upon any material point they were at liberty to reject all his testimony unless he was corroborated

by the statements of other credible witnesses, is erroneous, since such corroboration may be by any credible evidence or facts and circumstances that may fairly be inferred therefrom.

9. A charge that fraud may be shown by proving circumstances from the existence of which fraud is the natural and irresistible inference, and that if the case made out is consistent with fair dealing and honesty the charge of fraud fails, is erroneous in a civil action as practically requiring the fraud to be shown beyond a reasonable doubt.

10. A charge that fraud will never be presumed from mere obscurity or apparent error, nor from incorrectness of a person's express estimate of the value of his property although that estimate may have been found incorrect, is an invasion of the province of the jury.

11. Where an insurance policy provides that it shall be void in case of any fraud on the part of the insured, such fraud need not have all the elements necessary to sustain an action for deceit; but any trick, artifice, or deception practiced with the object of securing some advantage in the adjustment or payment of a loss, to the prejudice of the insurer, and liable to have that effect, avoids the policy. *Commercial Bank v. Firemen's Ins. Co.* 87 Wis. 297, distinguished and limited.

12. Where, pursuant to the terms of a policy, it is avoided by fraud of the assured, a claim under the policy for a loss already sustained is forfeited also.

13. The discretion of the trial court in respect to the questions to be submitted for a special verdict does not go to the extent of warranting a refusal to submit a proper question covering a material controverted fact, unless that subject is covered by other questions submitted.

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Reversed.*

This is an action on a policy of fire insurance issued on the 30th day of June, 1892, for the term of one year, insuring plaintiff's property, described therein, to the amount of $2,500. Such property consisted of a wholesale stock of drugs, medicines, paints, and other merchandise kept by plaintiff in its wholesale establishment in the city of Milwaukee. The policy was one of several by which insurance was carried on such property to the amount of $65,500. On

the 28th day of October, 1892, such property was partially destroyed by fire. Plaintiff claimed to have suffered damages on such property by such fire in a sum in excess of $57,000. This action was brought to recover the proportionate share of such loss represented by the policy in question. The complaint is in the usual form. Defendant answered, putting in issue the amount of the loss, and alleging that the policy contained a provision rendering it void in case of any fraud or false swearing on the part of plaintiff, and that plaintiff had been guilty thereof.

Several questions were raised respecting the practice under the statute providing for a change of venue in civil cases. On the ground of prejudice of the presiding judge, a motion was made to change the place of trial to the circuit court, which was denied for defects in the affidavit of prejudice. Thereafter plaintiff withdrew all objection to a change of venue, and entered into a stipulation with defendant's counsel consenting to such change. An order was entered accordingly. More than twenty days thereafter elapsed before there was any effort made to pay the clerk's fees, and for that reason the papers were not transmitted. After the expiration of the time limited for the payment of the clerk's fees, defendant's counsel offered to pay the same, and demanded of the clerk that the papers be transmitted, which was refused. Thereupon defendant's counsel moved the court for an order that the clerk transmit the papers, which motion was denied, with $10 costs, and defendant's counsel duly excepted.

Numerous exceptions were taken by defendant's counsel to the reception and rejection of testimony, to the judge's charge to the jury, to refusals to charge the jury as requested by defendant's counsel, and refusals to submit questions proposed by them, each of which will be referred to in the opinion so far as necessary.

A special verdict was rendered, whereby the jury found

all the issues in plaintiff's favor, and assessed its damages at $2,208.40, whereupon defendant's counsel moved the court to set the verdict aside as contrary to the evidence and contrary to law, and for alleged errors committed on the trial, which motion was overruled, and exception to such ruling duly taken. Judgment was thereupon, on motion, entered in plaintiff's favor on the verdict, and defendant appealed.

For the appellant there was a brief by *Miller, Noyes, Miller & Wahl*, attorneys, and *J. V. Quarles*, of counsel, and oral argument by *Geo. P. Miller* and *Mr. Quarles*. They argued, among other things that if any trick, stratagem, or artifice is resorted to for the purpose of increasing the amount of the loss, the insurer may have a complete defense under such a policy as the one in suit. Webst. Dict. "FRAUD;" *Fenner v. Dickey*, 1 Flip. 34; Anderson, Law Dict.; 1 Bouvier, Inst. (Gleason's ed.), §§ 585, 586; *Haycraft v. Creasy*, 2 East, 92, 108; 1 Story, Eq. Jur. §§ 186, 187; *Lord v. Goddard*, 13 How. 198; *Foster v. Charles*, 7 Bing. 105; *Polhill v. Walter*, 3 Barn. & Adol. 114; *Sleeper v. N. H. F. Ins. Co.* 56 N. H. 401; *Leach v. Republic F. Ins. Co.* 58 id. 245; *Claflin v. Comm. Ins. Co.* 110 U. S. 95; *Maher v. Hibernia Ins. Co.* 67 N. Y. 292; *Virginia F. & M. Ins. Co. v. Vaughn*, 88 Va. 832.

For the respondent there was a brief by *Timlin & Glicksman*, and oral argument by *Nathan Glicksman*. They contended, *inter alia*, that even if some goods had been damaged or destroyed by the plaintiff after the fire, yet the defendants were still liable upon the policies for such goods as were destroyed or damaged in consequence of the fire. They were not liable for any goods that were damaged or destroyed by any other means. The loss was still unpaid, and they had surrendered or relinquished none of their rights or privileges. Therefore, assuming that what they charge is true, they have not been damaged. They have not waived any defense which they might have otherwise had, in reliance upon any act of

the plaintiff. They have not been deceived in any adjustment. Therefore there has been no fraud. *Ableman v. Roth*, 12 Wis. 81, 90; 2 Pomeroy, Eq. Jur. § 898; *McDonald v. Daniels*, 58 Wis. 426; *Foster v. Taggart*, 54 id. 391, 393; *Hutchins v. Hutchins*, 7 Hill, 104; *Commercial Bank v. Firemen's Ins. Co.* 87 Wis. 297; *Wolters v. Western Ass. Co.* 95 id. 265; *McMullen v. Hoffman*, 75 Fed. Rep. 547, 551; *Shaw v. Scottish Comm. Ins. Co.* 1 id. 761, 763; *Kircher v. Milwaukee M. M. Ins. Co.* 74 Wis. 470; *Griffey v. N. Y. C. Ins. Co.* 100 N. Y. 418; *McNally v. Phœnix Ins. Co.* 137 id. 389. In cases where it has been held that such acts as are here charged may constitute a defense, the policy provided that the claim should be forfeited in case of an "*attempt at fraud.*" Such was the form of the policy in *Oshkosh P. & P. Co. v. Mercantile Ins. Co.* 31 Fed. Rep. 200; *Kahn v. Traders' Ins. Co.* 34 Pac. Rep. 1059; *Carson v. Jersey City Ins. Co.* 43 N. J. Law, 300; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 420.

MARSHALL, J. It is contended on the part of the appellant that, an order to change the place of trial having been duly made on a stipulation of the parties pursuant to sec. 2622, R. S., though defendant failed to pay the costs within twenty days after the making of such order, as required by sec. 2627, R. S., the clerk should, nevertheless, have transmitted the papers when the costs were paid, and, upon his refusal so to do, the court, on the motion made for that purpose, should have directed such transmission, and treated such motion, if necessary, in the nature of a motion to extend the original time therefor, and granted it. We cannot sustain this contention. Sec. 2627, R. S., provides as follows: "If such transmission be not made within twenty days from the making of the order to change the place of trial, . . . unless such time be extended, such order shall be deemed vacated, and no change for the same cause thereafter made." Three things are essential to a change

of venue in cases other than those mentioned in sec. 2621, R. S.: First, an application on some statutory ground; second, the entry of the order for the change; third, the payment of the clerk's fees, and transmission by him of the papers, within twenty days after the making of the order. If the last act be not performed as required, the proceeding for the change falls, and the clerk will have no authority thereafter to transmit the papers. *Holt v. Coleman*, 61 Wis. 422. It appears by the record that the clerk refused to recognize the existence of the order changing the venue after the expiration of twenty days from the making thereof, and that appellant's motion was made, not for an extension of time for transmitting the papers upon the ground of excusable neglect or upon any other ground appealing to the discretion of the court, but it was made on the theory that the order was still in force, and that the clerk should have complied with appellant's request to transmit the papers upon payment of his fees, notwithstanding the expiration of the twenty days. It follows that the motion called for a decision of this question: Was the order, though entered by consent, vacated by lapse of time, under sec. 2627? There could be but one result of such a motion. The court had no other course to pursue but to deny it, without violating the plain provision of the statute and the decision of this court in *Holt v. Coleman*, *supra*. It was competent for the court to grant an extension of time to transmit the papers, even after the expiration of the twenty days from the making of the order (*Cartright v. Belmont*, 58 Wis. 370), had a motion, based on a proper showing to authorize it, been made; but no such motion was made.

It is further contended that the motion for a nonsuit should have been granted. Such contention is based on the theory that certain evidence, discussed in the paragraph that follows, was improperly admitted, and that without such evidence there was no competent proof of the loss sustained.

The case, in respect to such loss, did not wholly rest on such evidence. There was evidence that a considerable quantity of goods was totally destroyed; also evidence, not objected to, that when the last inventory was taken — February, 1891 — the value of the goods on hand exceeded $75,000; that the stock was still larger at the time of the fire, and that the goods saved from the fire were diminished in value thereby. The evidence which was objected to was offered and admitted to show the exact amount of the stock when the loss occurred. With that entirely out of the case, a verdict might properly have been rendered in plaintiff's favor; hence the motion for a nonsuit was properly denied.

It is further contended that the judgment should be reversed for error in allowing Fred Dohmen, Sr., and Henry Dohmen to testify from the corporation account books respecting the amount of goods on hand at the time of the fire. This is the evidence specially referred to in the preceding paragraph. Fred Dohmen, Sr., testified without objection to the amount of goods on hand as shown by the inventory of February, 1891, and also testified to the correctness of such inventory. With that as a starting point, and without verifying the correctness of the account books in any way, he was allowed, against objection, to testify to the amount of purchases from the time such inventory was made up to the time of the fire, also as to the amount of sales during such period, as recorded in such books. The value of the goods when the fire occurred was then determined by adding to the amount as shown by such inventory the amount of the subsequent purchases, and deducting therefrom the sales as shown by the books; then adding to the result the percentage of profit which the witness Fred Dohmen, Sr., said the plaintiff averaged to make in the business. Thus the question is clearly presented of whether the amount of stock on hand at the time of the fire, under the circumstances, could properly be established by testimony given

of the contents of the books by a person who did not keep them, was not able to verify their correctness in any way, and without such correctness being verified in any manner, or the books being in evidence. That question must be answered in the negative. No authority has been brought to our attention, either by respondent's counsel or otherwise, that justifies the admission of such evidence.

Just how to proceed in such a case is by no means free from difficulty. In a large business, obviously it is impossible to produce witnesses to testify of their personal knowledge respecting the amount of stock on hand, or to the purchases and sales which may have occurred during a long period of time. The bookkeeper cannot ordinarily be expected to testify to more than that the entries made by him are correct, according to the facts as reported to him in the regular course of business. Such information must necessarily come to him from a variety of sources; and to verify the same, except in the most important transactions, in a large business, would be utterly impossible. There is a surprising dearth of authority on the question, considering the frequency with which the difficulty must be met in adjusting losses under similar circumstances. The general principles of the law of evidence applicable to the subject, properly understood, will furnish a safe guide. One of the most familiar rules is that the best evidence the nature of the case is susceptible of must be produced. 1 Greenl. Ev. § 82. From the very nature of the case, the only evidence of a definite character that could be produced was such as could be given by aid of the books. The stock of goods that existed, according to the inventory of February, 1891, had been added to in the regular course of business for over a year and a half, and the whole had been reduced by daily sales during that time. The multitude of transactions during such period, of goods taken in and sent out, could not be established by evidence from the mouths of witnesses. The only evidence

that existed was locked up in the books. Such being the case, upon such books being reasonably verified as correct records of the daily transactions in the business as such transactions were regularly reported to the office to be recorded in such books, with proof that the books were relied upon by plaintiff solely as a repository of the facts in regard to the business, and that they were uniformly found to be correctly kept, a witness who had occasion to refer to them from time to time, and had thereby, and through a general knowledge of the business, been convinced of their correctness, might properly testify, by their aid, to their contents as facts, without having personal knowledge of such facts independent of the books, and without ever having had any other knowledge of all the individual transactions than such as one might be reasonably expected to have by generally overseeing a business. Such evidence would not be conclusive by any means, but would constitute evidence bearing on the question in suit proper to be submitted to the jury with all the other evidence in the case.

This is within the spirit, but perhaps goes beyond the rule, in *Schettler v. Jones*, 20 Wis. 412, *Reed v. Jones*, 15 Wis. 40, and *Sexsmith v. Jones*, 13 Wis. 565. In *Reed v. Jones*, Roberts, who was present and kept the books part of the time, testified as to the correctness of his work, though he had no personal knowledge other than that the entries were in accordance with the facts as reported to him. Jones, who was familiar with the business transactions in a general way, and had been an actor in many of such transactions, but without any present remembrance of such transactions in detail, and without ever having had actual knowledge that such transactions were recorded in accordance with the facts, was allowed, by reference to the books, to testify to the expenditure of money as there recorded in numerous items. The court, by Mr. Justice PAINE, in regard to such evidence, said, in effect, that from the necessities of the case it is the

only kind by which such expenditures can be substantiated; that no party can produce upon the stand all the parties necessary to speak from personal knowledge of each of the transactions which occur in a large business, and it is not within the power of human memory, unaided, to recollect such transactions with sufficient accuracy to testify to them in detail; that the most that can be done is for persons conducting business to keep accurate accounts; and, where such accounts are not direct evidence between the parties, they may be used as memoranda to aid the memory of witnesses who have otherwise actual knowledge of the transactions and of the general correctness of the books. We are not unmindful of the force of the words used by Mr. Justice PAINE, "who have otherwise actual knowledge of the transactions," and that there is much in most of the cases on this line indicating that a witness testifying by the aid of the books must at some time have had actual knowledge of their correctness, or of the transactions; but when the facts in *Reed v. Jones* are studied it will be seen that it was not pretended that the witness Jones, who testified by the aid of the books, ever had such actual knowledge. The most that can be said is that he had a general familiarity with the business as it was transacted. There is nothing to show that an inspection of the books refreshed his memory and recalled previous actual knowledge of such transactions, or that he at any time knew that the books were correct; yet his general knowledge was such as to satisfy one, ordinarily, of such correctness. Where a person is engaged in and has general knowledge of an extensive business; has personal charge of it much of the time; has a regular system by which all the transactions go to the bookkeeper to be there recorded; and is in the habit, from time to time, of referring to such books while many of the matters of which he has personal knowledge are fresh in his mind, or when, though such matters are forgotten, an examination of the

books brings back the previous knowledge of the facts; and where such books, by such use, are found to be uniformly correct, and are further shown to be correct by their daily use in settlements with customers,—on proof of such facts, together with evidence by the bookkeeper that all the transactions were correctly recorded by him as they were reported for that purpose from day to day in due course of business, such person may testify, by their aid, to the transactions recorded on such books as facts.

Here there was no proper foundation laid for the use of the books. They were merely produced as the books of account kept in the business, and, without any verification whatever, the witnesses were allowed to testify respecting their contents. There is no rule with which we are familiar that warranted the admission of the evidence under the circumstances. It was prejudicial error, for which the judgment must be reversed.

Numerous errors are assigned on exceptions to the rulings of the trial court admitting and rejecting evidence, all of which have received consideration. No prejudicial error is perceived in respect to any of such rulings. Considerable stress is put on the refusal of the court to allow W. N. Johnson, one of the insurance adjusters who had examined plaintiff's books four months after the fire, at the store then operated by plaintiff, and to which the goods saved from the old store had been transferred, to answer the following question: "According to the books of the *F. Dohmen Company*, as examined by you, what were the total sales from the 28th day of October, 1892, to the 28th day of February, 1893, inclusive?" Several other questions of like character were ruled out. Such questions were obviously objectionable. It was not competent to prove the amount of the sales at the new stand, or the amount of the stock there, by testimony of what appeared upon plaintiff's books. If defendant desired to use the books for that purpose, they should have been

produced in court. They would have been the best evidence of their contents, and might have been used as admissions against interest, of the facts of which they purported to be a record.

The court charged the jury as follows: "*So that whatever damage was done to the property of the plaintiff in this case was in consequence of the fire which occurred at that time.*" One of the defenses was that plaintiff had destroyed or injured goods, or caused the same to be done, after the fire, in order to increase the loss. There was an issue in that regard for determination by the jury. There was evidence tending to support defendant's side of that question. The language of the charge was well calculated to take such question from the jury. Probably the court did not so intend, but the language was susceptible of being so understood; hence it was harmful.

The appellant's counsel excepted to the following language in the judge's charge: "*You are not at liberty to reject the testimony of any witness who has testified in your hearing in this case because his statements are in conflict with the statements of another witness who has also testified in your hearing.*" Respondent contends that by this the learned judge intended to convey the idea that the jury should not reject the evidence of a witness arbitrarily, without trying to reconcile it with that of others with which it was in conflict, merely because of such conflict. It is probable that such was the intention; but in testing the accuracy of an instruction it cannot be approved because, in the sense intended, it was free from error, if it was liable to be, and may probably have been, understood in a different sense, which was harmful. Instructions to juries should be clear, accurate, harmonious, and concise statements of the law applicable to the evidence and the issues to be determined; not argumentative or ambiguous. An instruction which plainly has a tendency to mislead the jury, and may probably have had that effect,

even though the instructions, when taken together, embrace correctly the law of the case, is harmful. *Price v. Mahoney*, 24 Iowa, 582; *Pittsburgh, C. & St. L. R. Co. v. Krouse*, 30 Ohio St. 222; *Murray v. Comm.* 79 Pa. St. 311. Applying the foregoing to the instruction under consideration, it was erroneous and prejudicial. The jury might well have understood that they could not reject the evidence of a witness because in conflict with the evidence of another witness. They might well have understood the language of the court as a direction not to reject the evidence of one witness because contradicted by another. So understood, it was manifestly erroneous, and a clear invasion of the province of the jury. It was undoubtedly their right to reject the evidence of any witness whose testimony they believed to be false, though such belief was founded solely on the ground that such evidence conflicted with that of some other witness of whose truthfulness they were convinced either by his manner or by any other of the many lights that may properly influence a jury in determining the credibility of witnesses.

The following language in the judge's charge was excepted to: "*If you come to the conclusion that any witness has knowingly and wilfully testified in your hearing to that which is false upon any material point, you are at liberty to reject all of the testimony of that witness, unless he is corroborated by the statements of other credible witnesses.*" Such is not the law. To avoid the liability of the entire testimony of a witness being rejected in such a case, it is not requisite that he should be corroborated by a *witness*, much less by *witnesses*. The corroboration may be by any credible evidence, or facts and circumstances that may fairly be inferred therefrom. *Allen v. Murray*, 87 Wis. 41; *Hillman v. Schwenk*, 68 Mich. 293; *Bowers v. People*, 74 Ill. 418; *Blotcky Bros. v. Caplan*, 91 Iowa, 352.

The following language in the charge was excepted to: "*One who alleges fraud must clearly and distinctly prove the*

fraud he alleges. It must be proven by clear and satisfactory evidence. It may be established by proving circumstances from the existence of which fraud is the natural and irresistible inference. But if the case made out is consistent with fair dealing and honesty, the charge of fraud fails. . . . Fraud will never be assumed from mere obscurity or apparent error, nor will a fraud be presumed from incorrectness of a person's express estimate of the value of his property, although that estimate may be found to have been incorrect." This language is open to serious criticism. When the learned judge said, in effect, that the burden of proof to establish fraud is on the party alleging it, and that it is incumbent upon such party to establish the allegations in that regard by clear and satisfactory evidence, he said all there was to be said on that point, and gave to the jury the correct rule. *Rice v. Jerenson*, 54 Wis. 248; *Blaeser v. Milwaukee M. M. Ins. Co.* 37 Wis. 31; Jones, Ev. § 190. When he added thereto: "*It may be established by proving circumstances from the existence of which fraud is the natural and irresistible inference,*" and that, "*if the case made out is consistent with fair dealing and honesty, the charge of fraud fails,*" he, in effect, told the jury that, unless the evidence established fraud beyond a reasonable doubt, the charge fails. Probably the learned trial judge did not intend to be so understood, but unguardedly used language from which the jury might well have drawn such an inference. Again, when the court said, "*fraud will never be assumed from mere obscurity or apparent error, nor will fraud be presumed from incorrectness of a person's express estimate of the value of his property, although that estimate may be found to have been incorrect,*" the court, in effect, directed the jury in a matter which should have been left solely for their decision; moreover, directed them erroneously. Whether the obscurity in which a person charged with fraud leaves the facts, when he is so circumstanced that he can readily remove such obscurity if he is innocent, yet fails

to do so, constitutes evidence sufficiently strong to satisfy the jury that he is guilty of the fraud charged, is a matter wholly for the jury to determine. It was error to instruct to the contrary. The same may be said in respect to the direction which the court gave regarding the effect of overvaluation of property. The weight to be given to such circumstances was a matter with which the trial court had nothing to do. *Fowler v. Colton*, 1 Pin. 331; *Ketchum v. Ebert*, 33 Wis. 611; *Lampe v. Kennedy*, 60 Wis. 110.

There was considerable evidence bearing on the question of whether the plaintiff's officers and employees, after the fire, destroyed, or caused to be destroyed, property covered by the policy, and committed other acts, for the purpose of increasing the claim for loss over that actually sustained. Evidence was offered to sustain the defense that the plaintiff had been guilty of fraud, which, under the terms of the policy, would avoid it. On this subject the following question was submitted to the jury as a part of the special verdict: "*Did the plaintiff commit any fraud touching any matter relating to the insurance, or the subject thereof, after the loss had occurred?*" Touching this question, the court instructed the jury to the effect that the word "fraud," as used in the question, means the wrongful doing of some act calculated and with intent to injure another, and which such other relies upon and acts to his injury, the circumstances being such that such other could not, by the exercise of due diligence, have discovered the truth in time to have prevented the injury. In this the learned judge intended to interpret the meaning of the word "fraud" as used in the policy in the following connection: "*This entire policy shall be void in case of any fraud or false swearing by the insured touching any matter relating to his insurance, or the subject thereof, whether before or after a loss.*" He, in effect, held that the word "fraud," as there used, included all the essential elements of fraud in an action for deceit. Several other instruc-

tions were given relating to the same subject, which need not particularly be referred to. All were duly excepted to. It is contended on the part of plaintiff's counsel that, conceding that such instructions were erroneous, defendant was not prejudiced thereby, because the facts upon which defendant relied to make out the defense of fraud were specially found in plaintiff's favor. Let that be as it may, the question is too important to let go unnoticed, inasmuch as the cause must, for errors heretofore referred to, go back for a new trial.

Commercial Bank v. Firemen's Ins. Co. 87 Wis. 297, is confidently relied upon to sustain the instructions under discussion. It is sufficient to say that the question here was not there presented, and that what was there said must be considered with reference to the facts of that case. There, an adjustment of the loss had been made. The action to recover the amount of the loss was brought on such adjustment. The fraud claimed was that such adjustment had been procured by means of books that had been altered for the occasion. No evidence was given to show that such books, as so altered, were not according to the facts, or that the loss as adjusted was in excess of the actual loss sustained. The trial court refused to instruct the jury that if, notwithstanding the alteration of the books, the loss was correctly adjusted, the alteration was immaterial. The court also refused to permit evidence that the alterations were not made with intent to defraud. For failure to give such instructions, and to permit such evidence, among other things, the judgment of the lower court was reversed; the judicial idea, we may say, being that acts not intended to defraud or necessarily calculated to have that effect, followed by an adjustment respecting the amount of loss, correct in fact, cannot constitute fraud such as to avoid the policy. The court certainly did not intend to decide, or Mr. Justice NEWMAN, who wrote the opinion, to say, that under the clause of the

policy under consideration an act on the part of the assured, intended to defraud the assurer, must be committed, and the latter actually be induced thereby to part with something of value or lose some valuable right, in order to avoid the policy on the ground of fraud. This court held there, as here, that to constitute fraud the act must be knowingly done and with intent to injure, and that it must be such an act as to be liable to effect that result. If the circumstances are such that the intent to injure cannot be effectuated, then there can be no fraud within the meaning of the policy. Such was the case of *Commercial Bank v. Firemen's Ins. Co.* The actual loss, so far as appeared from that case, was equal to or in excess of that indicated by referring to the altered books as evidence; hence, notwithstanding the change, and without regard to the intent of such change, no injury could come to the insurance company; hence there was no liability of its being injured by such change. Such is not this case.

The law is well settled that if the assured intentionally overvalues his loss, or commits any other act for the purpose of obtaining a sum greater than the value of the property destroyed, and the circumstances are such that such conduct is liable to effect such result, it is fraud which avoids the policy under a clause making fraud or false swearing in respect to the loss have that effect. *Park v. Phœnix Ins. Co.* 19 U. C. Q. B. 110; *Sibley v. St. Paul F. & M. Ins. Co.* 8 Ins. Law J. 461; *Shaw v. Scottish C. Ins. Co.* 1 Fed. Rep. 761; 7 Am. & Eng. Ency. of Law, 1047, and cases there cited. In *Maher v. Hibernia Ins. Co.* 67 N. Y. 283, FOLGER, C. J., said, in effect, that fraud, as used here, means any trick or artifice by one to induce another to fall into error to his harm. To the same effect is *Claflin v. Comm. Ins. Co.* 110 U. S. 81, cited by appellant's counsel, and many other cases that might be cited. And the same rule applies whether

the term used is "fraud or false swearing," or "fraud or attempted fraud or false swearing." No authority can be found, we may safely say, to sustain the contention that fraud which will avoid a policy under such a clause must have the elements necessary to constitute a cause of action based on fraud. Where the deception or artifice practiced results in payment of the loss, in an action brought to recover back the money all the conditions which the learned judge held requisite to make out fraud would be essential to sustain the cause of action. His difficulty grew out of a failure to distinguish between deception and artifice constituting fraud liable to do harm, which avoids a policy of insurance under a contract which so provides, and a cause of action based on fraud.

The effect of the foregoing is that any trick, artifice, or deception practiced with the object of securing some advantage in the adjustment or payment of a loss under a policy of insurance, to the prejudice of the insurer, and liable to have that effect, avoids the policy. What was said in the charge in this case, inconsistent with the law as stated, was error. There is nothing in *Wolters v. Western Ass. Co.* 95 Wis. 265, inconsistent with this view.

It is further contended that, if the court gave erroneous instructions in regard to the subject of fraud, it was immaterial, because the policy does not provide for a forfeiture of a claim for a loss on that ground; that the provision in the policy, avoiding it for fraud or false swearing, does not reach an existing claim for loss. A distinction is claimed between the forfeiture of the claim for loss sustained under the policy, and forfeiture of the policy itself. Such distinction is so inconsistent with the plain intent and meaning of the contract of insurance as not to require discussion. The action to recover the loss is on the contract. One of its conditions is that fraud or false swearing, etc., shall avoid it.

Obviously, all causes of action on the contract must fall with the policy upon the happening of the contingency which avoids it.

The trial court was requested to submit to the jury a question requiring a special finding in respect to the amount of property totally destroyed. That was the principal controverted fact in the case. The defendant had an absolute right to have a special finding on each material question. *Davis v. Farmington*, 42 Wis. 425. True, the trial court had a large discretion in respect to the questions to be submitted (*Knowlton v. Milwaukee City R. Co.* 59 Wis. 278), but such discretion did not go to the extent of warranting a refusal to submit a proper question covering a material controverted fact. Such refusal could only be justified upon the ground that the subject was covered by other questions submitted. Such is not the case here. The refusal to submit the question requested was error.

There are several other errors assigned, but a consideration of them does not appear to be necessary. All necessary to the decision on this appeal or for guidance on a future trial have been considered and decided.

By the Court.— The judgment of the superior court is reversed, and the cause remanded for a new trial.

F. DOHMEN COMPANY (LIMITED), Respondent, vs. MANUFACTURERS' & BUILDERS' FIRE INSURANCE COMPANY, Appellant. 96 57 / 102 91

March 19 — April 30, 1897.

F. Dohmen Co. v. Niagara F. Ins. Co., ante, p. 38, followed.

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Reversed.*

This is an action to recover on a policy of fire insurance

covering the same property mentioned in the case of *F. Dohmen Co. v. Niagara Fire Ins. Co.*, *ante*, p. 38. The action is on one of the policies mentioned in such previous case. It was issued October 22, 1892, insuring such property for the term of one year to the amount of $1,250. The complaint alleged all the facts necessary to a recovery. The answer put in issue the amount of the loss, and the issue thus raised was the only one litigated on the trial. There was a motion for a change of venue to the circuit court made and denied. The objection to the granting of such motion was thereafter withdrawn by stipulation, and an order entered changing the place of trial. Defendant failed to pay the clerk's fees and have the papers transmitted within the time prescribed by statute. The clerk refused to transmit the papers after the expiration of such time, and thereupon defendant moved the court for an order for such transmission, which motion was denied, and defendant excepted thereto. At the close of the plaintiff's case, defendant's counsel moved the court for a nonsuit, which was overruled. No evidence was offered by defendant. On motion of plaintiff's counsel, the court directed a verdict in plaintiff's favor for $1,101.89, the full amount claimed. There was a motion to set the verdict aside as against the evidence and for errors committed on the trial, which was overruled and excepted to. Judgment was entered in plaintiff's favor upon the verdict, and defendant appealed.

For the appellant there was a brief by *Miller, Noyes, Miller & Wahl*, attorneys, and *J. V. Quarles*, of counsel, and oral argument by *Geo. P. Miller* and *Mr. Quarles*.

For the respondent there was a brief by *Timlin & Glicksman*, and oral argument by *Nathan Glicksman*.

MARSHALL, J. The only questions presented on this appeal relate to proceedings for a change of venue and to the exceptions taken to the admission of evidence of the con-

tents of plaintiff's books, without any foundation being laid therefor. The same questions were raised and determined in *F. Dohmen Co. v. Niagara Fire Ins. Co., ante*, p. 38. The decision in that case rules this, and requires a reversal of the judgment appealed from.

By the Court.— The judgment of the superior court is reversed, and the cause remanded for a new trial.

TYSON, Respondent, vs. TYSON and another, imp., Appellants.

March 20 — April 30, 1897.

Deeds: Passive trust: Perpetuities: Contingent remainder: Alternative estates.

1. A deed purporting to convey to trustees the legal title to land, to hold such title and thereafter to make conveyances thereof upon various contingencies specified, created a passive or dry trust, and not an express trust as defined and authorized by sec. 2081, S. & B. Ann. Stats.; and hence, under secs. 2073, 2075, such deed will be treated as if the grants were in direct terms to the beneficiaries.
2. A deed reserving a life estate in the grantor, and granting a life estate thereafter to his daughter then living, with contingent remainder to the heirs of her body yet to be born (or such of them as she should appoint by will), did not suspend the absolute power of alienation for a longer period than during the continuance of two lives in being at the creation of the estate, within the meaning of sec. 2039, R. S., since the estate of the heirs of the body of the daughter must vest in possession, if at all, at the close of her life.
3. A further provision of the deed, attempting to grant estates to take effect in the event of the failure of issue in the daughter, did not, even if void, affect the validity of the contingent remainder to her children.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

The case is thus fairly stated in the appellants' brief:

This is an action to remove a cloud upon the title of certain

real estate, by annulling a trust deed and a will, in certain particulars, and having them declared void as being in violation of the statutes against unlawful suspension of the power of alienation.

Prior to the 19th day of November, 1874, Robert H. Cabell, of Baltimore, Md., owned fifteen lots in the city of Milwaukee. On said 19th day of November said R. H. Cabell and Catharine, his wife, made and executed a trust deed of said lands to I. A. Lapham and George G. Houghton, both of the city of Milwaukee, reciting that they (the Cabells) had an only child, *Virginia Catharine Cabell*, then in her fourteenth year, and were anxious to convey said lands by absolute title, free from claim of dower, to trustees, for the uses and purposes therein set out, and conveying the same to said Lapham and Houghton, trustees, their successors or assigns, upon the trust and purpose: (1) That they should hold the same for the use of grantor R. H. Cabell during his life, and permit him to use, occupy, and enjoy the same, to take, receive, and enjoy the rents, issues, and profits thereof during his life, with power to lease the same and give acquittances for the rents thereof without the same passing through the trustees; the said R. H. Cabell reserving to himself a life estate in said lands, and the rents, issues, and profits thereof, as fully as if said deed had never been made. (2) That trustees should hold said lands at the death of said Cabell to and for the sole use and benefit of his said only child, *Virginia Catharine*, if she should survive him, during her life, to be freed and discharged from, and in no manner to be subject to, the debts, contracts, control, or marital rights of any husband she might take, but as her sole, separate, and exclusive estate during her life, and trustees should permit her to use, occupy, and enjoy the same, to take the rents, issues, and profits thereof as her sole, separate, and exclusive estate, with power in her (or in her guardian during minority or until marriage) to lease the same and give acquittances for rents, without the same passing through said trustees, during her life.

Herein said *Virginia Catharine* was granted power and authority, after reaching twenty-one years of age, and while she should be married or a widow, to devise, appoint, and distribute said lands, or any part thereof, in fee simple, by her last will, in such manner or proportions as she might think proper, between her children, if any, living at her death, and the lawful issue of any children of hers who might die in her lifetime leaving such issue; and she might allot the whole of said lands to any one or more such persons to the exclusion of the others, with which power and right of selection she was expressly invested and intrusted, and the execution whereof was to depend upon her own free will and option; and in the event that she should die, leaving a will in the execution of such power, the trustees should surrender and convey said lands, or such part thereof as she should so appoint, to such of her children living at her death, or the lawful issue of any child of hers that might have died in her lifetime leaving such issue, as she might by her will have selected or appointed, and in such manner or proportions as she might thereby direct or appoint.

But (3) if *Virginia Catharine* should die without leaving a will in the execution of said power, the trustees should convey said lands in fee simple equally to the children of said *Virginia Catharine* living at her death, and the issues of any child of hers that may have died in her lifetime leaving issue, such issue taking according to the right of representation.

If (4) *Virginia Catharine* should die without leaving any child living at her death, or the issue of any child of hers that might have died in her lifetime, trustees should hold the said lands for the use of Catharine Cabell, her mother, during her life, and at the death of Catharine convey the same in fee simple to such persons as should then be the heirs at law of said R. H. Cabell according to the laws of the state of Wisconsin.

If (5) *Virginia Catharine* should die without leaving any child living at her death, or the issue of any child of hers that may have died in her lifetime leaving issue, and if Catharine Cabell, her mother, should not survive her, trustees should convey said lands to such persons or person as should at the death of said *Virginia Catharine* be the heirs at law of said R. H. Cabell, according to the laws of Wisconsin.

If, (6) at the death of said R. H. Cabell, *Virginia Catharine* should not be living, trustees should convey the lands to her children, if any should be living at her death, and the issue of any child of hers that might have died in her lifetime leaving issue, such issue taking by representation.

If (7) *Virginia Catharine* should then have died without leaving child or issue, trustees should hold for Catharine Cabell during her life, and at her death convey to such persons as should then be heirs at law of said Cabell according to the laws of Wisconsin.

If (8) at R. H. Cabell's death Catharine Cabell should also be dead, trustees should convey to such persons as should at his death be his heirs according to the laws of Wisconsin.

It was provided further in and by said trust deed that the trustees should have no power to sell, lease, incumber, or dispose of said lands, or the rents, issues, or profits thereof, and that it was intended solely to convey the lands to them for the purposes set out, and no other, and they should hold the same for the benefit of the persons mentioned, and convey to such persons, as aforesaid.

This trust deed was by said R. H. Cabell caused to be recorded in the register of deeds' office in Milwaukee county on November 25, 1874; and said Lapham and Houghton consented to accept the trusts therein, but never entered on the performance thereof, or into the possession of the property. Said R. H. Cabell died at Baltimore about the 20th day of February, 1875, leaving surviving him his wife, Catharine, and his only child, *Virginia Catharine*, and leaving a

will, the second paragraph whereof runs as follows: "2nd. Having conveyed to I. A. Lapham and George G. Houghton, of Milwaukee, as trustees, certain lots of land in that city, fifteen in number, by a deed in my lifetime, in which my wife united, dated on November 19, 1874, and to be recorded in said city, in which said deed the said fifteen lots, all of them and each of them, are fully described, I do hereby refer to said deed for the purpose of ratifying and confirming the same, if necessary, and of further declaiming that it is my wish and desire that the said fifteen lots of land therein described should at my death pass to such persons, and on such uses, trusts, and limitations as are in said deed expressed, and none other; and if this shall, by any possibility, have not already happened and been acomplished by virtue of said deed before my death, it is my will and intention that it may and shall be brought to pass by this my will." All the rest and residue of his property, beyond the fifteen lots above mentioned, and excepting the property owned by his wife, the testator devised in fee to his wife and child equally, share and share alike.

The will was admitted to probate by the county court of Milwaukee county. Catharine Cabell, wife of testator, was appointed guardian, under the will, of *Virginia Catharine*, and possessed and controlled the lands in suit until *Virginia Catharine* became twenty-one years of age in 1882, since which time she has been in possession and control thereof. About 1883 *Virginia Catharine* was married to B. H. Tyson, and she has two children, *Virginia Cabell Tyson*, aged nine years in October, 1893, and *Juliet Catharine Tyson*, aged eight years in March, 1894. *Virginia Catharine* brings this action to annul said trust deed and will as far as they undertake to dispose of said lands beyond her own life, and to have the court declare that said R. H. Cabell, beyond providing by said trust deed and will for life estates in himself and in his daughter, the plaintiff, died intestate; that said

trust deed and will are, subject only to said life estates in grantor and in his daughter, void, as in violation of the statutes of this state prohibiting suspension of the power of alienation of real estate, and, since said R. H. Cabell died intestate as to the disposition of said lands beyond the life of his daughter, the same descend to her, as his heir at law. Her infant children aforesaid, *Virginia Cabell Tyson* and *Juliet Catharine Tyson*, plaintiff makes defendants, as well as George G. Houghton, one of the trustees; the other, I. A. Lapham, having died.

Such is a statement of the facts found by the circuit court, and about which there is no dispute.

It was further alleged by plaintiff, but not found by the court, that on the 8th day of January, 1894, Catharine Cabell executed and delivered to plaintiff a quitclaim deed of all her right, title, and interest in and to said lands, and that in the matter of the will of R. H. Cabell the county court, by its final order and decree, made and entered on May 13, 1875, ordered that all the property and estate of R. H. Cabell whatsoever, in the state of Wisconsin, be assigned to Catharine Cabell and *Virginia Catharine* equally, share and share alike.

As conclusions of law the circuit court determined, *first*, that no estate, right, title, or interest whatsoever was created in said trustees, Houghton and Lapham, or either of them, by said deed, but that the rights and interests sustained by the conclusions of law as valid grants passed directly to the beneficiaries thereof, and said deed was, as far as it undertook to create any estate in said trustees, null and void; *second*, that said deed was valid and effectual to, and did, create and reserve in said R. H. Cabell an estate for life in said lands; *third*, that in and by said deed R. H. Cabell created a valid and effectual life estate in his daughter, *Virginia Catharine*, the plaintiff, and said deed was valid and binding for that purpose; *fourth*, that all the provisions

and conditions of said deed whereby an estate in remainder was sought to be created in the surviving children of *Virginia Catharine*, or in such of them as she might appoint by her last will, are void, because of the unlawful suspension of the power of alienation sought to be effected through said remainder and the conditional remainder thereafter; *fifth* and *sixth*, that all parts and clauses of the said deed (and the will, as far as it attempted to ratify and confirm the same) whereby estates were attempted to be created, and the course of the property directed, beyond the life of *Virginia Catharine*, were in violation of the statutes of Wisconsin against perpetuities, and void, as in violation of the provisions of secs. 14, 15, ch. 83, R. S. of 1858 of Wisconsin; and *seventh*, that on the death of R. H. Cabell the entire estate in said lands descended as intestate property to the plaintiff, *Virginia Catharine*, the only child of said R. H. Cabell, and she was entitled to judgment establishing her title in fee to said lands, and to have said deed and will, as far as they conflicted therewith, set aside as a cloud upon her title. Judgment was entered in accordance therewith, and the defendant infants appealed.

For the appellants there was a brief by *H. P. Richardson*, guardian *ad litem*, and *J. G. Flanders*, of counsel, and supplemental briefs and oral argument by *Mr. Richardson*. They argued, among other things, that the grantor, his daughter, and his wife were all in being at the creation of the estate. At the end of the two lives of the grantor and his daughter her issue will take in possession if ever. This satisfies the statute. *Ford v. Ford*, 70 Wis. 19, 61; *Scott v. West*, 63 id. 529, 595; *Saxton v. Webber*, 83 id. 617, 629; *Montignani v. Blade*, 145 N. Y. 111, 120, 121; *Schermerhorn v. Cotting*, 131 id. 48; *Henderson v. Henderson*, 113 id. 1; Chaplin, Suspension of Power of Alienation, §§ 90, 91, 122, 123; *Kelso v. Lorillard*, 85 N. Y. 177; *Wilson v. White*, 109 id. 59, 61. There is no limit to the number of contingencies if the

remainder vests at the end of two lives. Chaplin, Suspension of Power of Alienation, § 343, and cases cited. Valid alternative estates are not affected by void alternative estates. Chaplin, Suspension of Power of Alienation, § 483; *Schettler v. Smith*, 41 N. Y. 328, 336, 345, 346; *Webster v. Morris*, 66 Wis. 366, 393, 394; *Jackson v. Phillips*, 14 Allen, 539, 572; *Perkins v. Fisher*, 59 Fed. Rep. 801; *Armstrong v. Armstrong*, 14 B. Mon. 333, 346; *Evers v. Challis*, 7 H. L. Cas. 531, 555; 2 Washb. Real Prop. (5th ed.), 761, 778; Perry, Trusts, § 381; 1 Jarman, Wills (6th ed.), 283, 287; *Ackerman's Adm'r v. Vreeland's Ex'r*, 14 N. J. Eq. 23, 26; *Monypenny v. Dering*, 2 De Gex, M. & G. 145; *In re Ewen*, 7 Misc. (N. Y.), §§ 619, 624; *Minter v. Wraith*, 13 Sim. 52, 62; Lewis, Perpetuities, 501; *Fowler v. Depau*, 26 Barb. 224, 237, 238; *Robinson v. Fowler Orphan Asylum*, 123 U. S. 703; *Seaver v. Fitzgerald*, 141 Mass. 401; *Fowler v. Ingersoll*, 127 N. Y. 472.

For the respondent there were separate briefs by *Quarles, Spence & Quarles*, attorneys, and *Edw. S. Bragg*, of counsel, and oral argument by *T. W. Spence*.

WINSLOW, J. The deed of November 19, 1874, purported to convey to Lapham and Houghton the legal title of the property in question in trust to hold such title and thereafter make conveyance thereof upon various contingencies as directed in the body of the instrument. The supposed trust was a passive or dry trust only,—a mere holding of the naked legal title. It was not an express trust, as defined and authorized by sec. 2081, S. & B. Ann. Stats., and hence it was one of the trusts abolished by the terms of sec. 2071 of the same statutes. So far, however, as the grants in the deed would have been valid if they had been made direct to the beneficiaries, so far the law executes the attempted trusts, and passes legal estates to the beneficiaries "of the same quality and duration, and subject to the same

conditions," as their beneficial interests. S. & B. Ann. Stats. secs. 2073, 2075. The deed is therefore to be treated as if no trustees were named, and as if the grants were in direct terms to the beneficiaries. The plaintiff's contention is that the contingent remainder attempted to be granted to the surviving children or issue of deceased children of *Virginia* or such of them as *Virginia* may appoint by will is void, and that her title should be freed from the apparent cloud created thereby. This is the only question presented in the case, and the only one we shall consider.

The trust deed reserved a life estate in Robert H. Cabell; then granted a life estate to *Virginia*, his daughter, who was then, and is now, in being; and then attempted to grant a contingent remainder to the heirs of the body of *Virginia* yet to be born or such of them as she should appoint by will. Here were evidently two life estates granted to persons in being at the creation of the estates, and a contingent remainder to persons not then in being. There were further provisions (in the event of failure of issue in *Virginia*) attempting to grant a third life estate to the grantor's wife, and an estate in fee thereafter in the then heirs of the grantor, but these provisions we find it unnecessary to consider. Whether these provisions were void or not, or whether the third life estate would drop out and the estate in fee move up and take its place, are questions which it may become necessary to decide at some time; but they are not now presented, nor can it now be told who are the parties interested in their determination. It may be conceded that these latter alternatives are all void, and yet the limitation to the children of *Virginia* may be valid. *Schettler v. Smith*, 41 N. Y. 328. The contingent remainder in *Virginia's* children precedes all these estates, and, if it is valid, then the plaintiff cannot recover. We think it valid. At the time of the execution of the trust deed the absolute power of alienation could not be suspended for a longer period than

during the continuance of two lives in being at the creation of the estate. R. S. 1878, sec. 2039. Every future estate which suspended the absolute power of alienation for a longer period than this was void in its creation. R. S. sec. 2038. The principle is that, in order to make the future estate valid, the suspension of the power of alienation must under all circumstances terminate at or before the termination of the second life. It is not sufficient that it may so happen. It must so happen in every possible contingency. The absolute power of alienation may be in suspense, and the person in whom the estate is to vest may be undetermined during the two lives in being, if at the close of that period the suspension must absolutely terminate. This requirement is met in the case before us. The estate of the heirs of the body of *Virginia must* vest in possession, if it vests at all, at the close of *Virginia's* life, or, in other words, at the termination of the second life in being at the creation of the estate. *Schettler v. Smith, supra; Ford v. Ford*, 70 Wis. 19-61. This satisfies the statute.

The sum and substance of the matter is this: The remainder limited to the children of *Virginia*, or such of them as she should appoint by will, is a valid contingent remainder at common law. It falls in the fourth class of contingent remainders, as defined by Mr. Fearne, namely, "Where a remainder is limited to a person not ascertained, *or not in being*, at the time when such limitation is made." Fearne, Remainders, 9. The statute which limits the time during which the power of alienation may be suspended does not affect the remainder here, because the time of suspension is limited by the grant itself to the duration of two lives in being. We are referred to no other statute which can be held to invalidate the remainder. It follows necessarily that the complaint should have been dismissed.

By the Court.—Judgment reversed, and action remanded with directions to dismiss the complaint.

A motion for an order that the costs of all parties herein in this court and in the court below be paid out of the property and estate in the custody of the court was denied June 11, 1897.

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SILVERTHORN, Respondent, vs. WYLIE, Administrator, Appellant.

March 22—April 30, 1897.

Contracts: Assignment: Consideration: Past services.

1. A want of consideration for the assignment of a contract is not a defense to an action by the assignee for money due on such contract.
2. Services previously performed on request constitute a good consideration for a promise to pay therefor.

APPEAL from a judgment of the circuit court for Marathon county: CHAS. V. BARDEEN, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Win Wylie*, attorney, and *Mylrea, Marchetti & Bird*, of counsel, and for the respondent on that of *Silverthorn, Hurley, Ryan & Jones.*

CASSODAY, C. J. It appears from the record and the findings of the trial court, in effect, that during 1888, and a long time prior thereto, one Alexander R. McDonald, of Wausau, was a practical woodsman, and proficient in estimating the quantity and quality of standing timber; that immediately prior to September 10, 1888, he rendered valuable services for Daniel B. Wylie, then living at said city, in selecting certain vacant lands and government lands desirable for private cash entry; that said services consisted in obtaining a correct plat of all vacant state and government lands in a town named, and going out over said vacant lands, and running

out the boundary lines of the various subdivisions thereof, and estimating the quantity and quality of standing timber thereon, and making minutes of the same, and thereby selecting four forty-acre tracts, deemed the most valuable and desirable for cash entry, one being a state forty, and the other three being government forties; that said services occupied one week, at an expense of $12 for an assistant, besides the ordinary expenses of the trip from Wausau; that, upon McDonald's report and selection so made, the said Daniel B. Wylie, September 10, 1888, entered or purchased the said three government forties from the United States and the forty from the state, paying therefor $200.50, and taking the title in his own name; that said services were so rendered with the understanding, which was afterwards reduced to writing and embodied in the written contract signed and delivered by the said Daniel B. Wylie to said McDonald, November 26, 1888, in consideration of said services, and as compensation therefor, which contract was to the effect that Daniel B. Wylie had purchased or entered the lands which were therein described, and which had been selected by Alexander R. McDonald, and that when said lands should be sold he thereby agreed to pay McDonald, after deducting the amount of the purchase money, with five per cent. per annum interest thereon, also any and all taxes that might be levied on said land, with interest at the rate of ten per cent. per annum, he would divide the balance of said proceeds equally between himself and the said McDonald; that said contract was duly assigned by McDonald to the plaintiff, October 12, 1891, as collateral security for an existing indebtedness of said McDonald to him in the sum of $1,150; that Daniel B. Wylie died testate, October 13, 1891, at Wausau, leaving a large estate of both real and personal property; that July 10, 1894, letters of administration of said estate *de bonis non* with the will annexed were duly granted and issued to the defendant, *Winfred Wylie*, who

then duly qualified, and entered upon the duties of his said office; that said estate has not yet been settled, and said defendant is now such administrator and in possession of available assets of said estate sufficient to pay all expenses of administration and all debts of said estate in full; that all of the claims against said estate had been paid in full except that of the plaintiff herein; that said contract was further assigned absolutely to the plaintiff by McDonald, July 31, 1895, for a valuable consideration, and that the plaintiff ever since has been, and now is, the lawful holder and owner of said contract; that October 13, 1894, the executors of said estate filed their inventory of said estate, wherein they included only one half interest in said lands, with a recital "that Alex. R. McDonald owns one half interest as per contract with deceased;" that March 4, 1895, the defendant, as the administrator of said estate, sold and conveyed to A. H. Strange Company all of the lands mentioned in said contract, and received therefor the sum of $800 as the proceeds of such sale; that at the time of said sale the deductions stipulated in said contract for purchase money, interest, and taxes, also including the costs of an abstract and incidental expenses of such sale, amounted in the aggregate to the sum of $355.38.

And as conclusions of law the court found, in effect, that the plaintiff's claim herein accrued and became absolute upon said sale on March 4, 1895, and the defendant, as administrator of said estate, thereupon became liable and indebted to the plaintiff in the sum of $222.31, the same being one half of the balance of the proceeds of said sale, after making the aforesaid deductions; that the plaintiff is entitled to judgment herein against the defendant, as administrator of said estate, for said sum of $222.31, with interest thereon at the rate of six per cent. per annum from March 4, 1895, and the taxable costs of this action, to be paid out of the assets of said estate. From the judgment entered

thereon accordingly the defendant, as such administrator, brings this appeal.

The several findings of fact appear to be each and all supported by the evidence. The fact that the lands described in the contract are included in the executor's inventory of the estate, with the recital that "Alex. R. McDonald owns one half interest as per contract *with deceased*," as found, makes it very manifest that there is no substantial merit to the defense. The assignments of McDonald to the plaintiff are both in writing, and purport to be upon a good and adequate consideration. But, even if the assignments were without such consideration, yet it would be no reason for withholding payment of the share of the proceeds which, by the terms of the contract, were to go to McDonald.

The contention that the contract to pay McDonald such share of the proceeds was without consideration is without foundation. "A promise to pay for past services implies that they were rendered upon previous request, and such services are good consideration for the promise." *Jilson v. Gilbert*, 26 Wis. 637; *Lampleigh v. Barthwaite*, Hob. 239, side page 105b; *Hatch v. Purcell*, 21 N. H. 544; *Wilson v. Edmonds*, 24 N. H. 517; *Paul v. Stackhouse*, 38 Pa. St. 302. The facts found bring the case within the principle of law stated. Certainly we are not to presume that McDonald expended his time and money and made the selections mentioned, and then voluntarily bestowed the entire beneficial results upon Daniel B. Wylie gratuitously and without any consideration whatever. Daniel B. Wylie was clearly liable for the services which McDonald had rendered for him, and of which he received the benefit. We find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

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THE STATE EX REL. MARINETTE, TOMAHAWK & WESTERN RAILWAY COMPANY, Appellant, vs. THE COMMON COUNCIL OF THE CITY OF TOMAHAWK, Respondent.

March 22 — April 30, 1897.

Municipal corporations: Aid to railroads: Consent, how given: Constitutional law: Tomahawk city charter: Repeal of general law by implication: Limit of indebtedness: When obligation accrues: Assessment: Division of school district: Apportionment of debts.

1. The provision of sec. 946, R. S., that the acceptance by a municipality of a proposition for subscription to the stock of a railroad company and the issuance of bonds in payment thereof may be given by the signatures of a majority of the resident taxpayers, without a submission of the question to the electors, is valid, and such consent when so given creates a contract binding upon the municipality.
2. Sec. 3, subch. IX, of the charter of the city of Tomahawk (ch. 58, Laws of 1891) provides that "no debt shall be contracted against the city . . . unless the same shall be authorized by a majority of all the members-elect of the common council," and that "the common council shall not, in any case, or under any pretext, or for any purpose whatever, contract debts or liabilities of any kind, name, or nature, exceeding the amount which it is authorized by the charter to levy for the current year." Secs. 12, 15, subch. V, provide that the council shall manage and regulate the finances and levy all taxes. Sec. 11, subch. IV, provides that, in addition to the amount of taxes for general city purposes, special taxes may be levied for certain purposes "of public utility," provided such special taxes shall first have been recommended by the council and afterwards approved by a vote of the people. Sec. 19, subch. XIII, authorizes the council to issue bonds of the city, not to exceed five per cent. of the assessed valuation, for such public improvements as shall be authorized by ordinance of the council adopted by a vote of three fourths of its members, the issuance of such bonds to be approved by a vote of the people. *Held*, that these provisions, construed together, are not at variance with, and do not by implication repeal, the general law relating to municipal aid to railroads (secs. 945 *et seq.*, R. S.),— sec. 3 of subch. IX being applicable only to debts for ordinary municipal purposes, and sec. 19, subch. XIII, being an affirmative provision merely, which does not prevent the

city from exchanging its bonds for stock of a railroad company up to the prescribed limit, when a valid contract therefor is made under the general law. *Perrin v. New London*, 67 Wis. 416, distinguished.

3. Although the amendment to sec. 3, art. XI, Const., limited the amount of indebtedness which a city might incur, yet the power and duty of the legislature remained to impose other restrictions or regulations; but the sufficiency of such restrictions being a question within the discretion of the legislature, its action in the premises is not reviewable by the courts.

4. Under sec. 948, R. S. (providing that no corporate bonds issued in exchange for railroad stock "shall be delivered, or be valid if delivered," until the road shall have been actually completed and in operation), no indebtedness on the part of the municipality can be said to have been incurred, within the meaning of sec. 3, art. XI, Const. (prohibiting municipalities from becoming indebted in any manner in excess of five per cent. of the value of the taxable property therein, "to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness"), until the road is completed in the prescribed manner.

5. The assessment intended as the basis of determining whether a municipal indebtedness is in excess of the five per cent. limit imposed by said sec. 3, art. XI, Const., is the last assessment of the municipality as equalized by the local board of review for the purposes of general taxation.

6. In determining whether a proposed issue of municipal bonds is in excess of the constitutional limit of indebtedness, all forms of indebtedness must be included except warrants for money actually in the treasury and contracts for ordinary expenses within the current revenue.

7. Where a city before its incorporation formed part of a school district, no part of the indebtedness of such district should be reckoned as an obligation of the city, in determining whether its constitutional limit of indebtedness has been reached, unless such indebtedness is shown to have been legally apportioned between the city and the district.

APPEAL from a judgment of the circuit court for Lincoln county: CHAS. V. BARDEEN, Circuit Judge. *Reversed.*

This was a proceeding to obtain a peremptory writ of *mandamus* to compel the common council of the city of *Tomahawk* to cause subscription to be made, on behalf of

said city, on the books of the said railway company, for shares of the capital stock thereof, equal to $9,000, and to pass and enact an ordinance or resolution directing and requiring the mayor and city clerk to sign, seal, and issue on behalf of said city, and deposit in escrow with J. W. Ladd, cashier, etc., as trustee, municipal bonds of said city of *Tomahawk* in a like sum, running to the said railway company as payee, bearing interest at the rate of six per cent. per annum, etc., and directing said Ladd to deliver said bonds to the relator company upon the finishing and completing of its railroad from said city to a point in section 34, township 35 N., of range 8 E., and the passage of cars over the same on or before December 1, 1895, upon a contemporaneous delivery to said city of such certificates of shares of the capital stock of said railway company; and, further, that said common council, prior thereto, enact an ordinance or resolution directing an annual levy of taxes in said city, in addition to all other taxes, sufficient to pay the interest annually growing due on said bonds, and also to pay and discharge the principal thereof by the time the same shall be due, according to their terms. A return was made to the alternative writ, and the issue was tried before the court, upon which there was a finding of facts, not excepted to, and, as a conclusion of law, that the relator had no right to the relief asked. Judgment was given dismissing the proceeding, with costs, from which, when perfected, the relator appealed.

The relator founds its right to relief upon proceedings under the general law in relation to issuing corporate bonds for the purpose of paying for an authorized subscription to the stock of the railroad company. R. S. sec. 942, and following sections. The relator submitted a proposition to the clerk of the city, pursuant to sec. 945, which was filed October 13, 1894. The formalities required by sec. 946 were observed, and December 17, 1894, the relator filed with the common council a petition, signed by the requisite number

of resident taxpayers. At the time of the commencement of the present proceedings, the relator had commenced, and during their pendency had seasonably completed, the road. On the 21st day of January, 1895, the relator requested the common council to cause subscription to be made for stock to fulfill the contract so made, and to execute and issue the bonds, etc., in order to carry it out, and tendered full performance of such contract on its part. Defendant neglected and refused to issue the bonds, and assigned as reasons for so doing: First, because such bonds could not be lawfully issued, under the charter of the city of *Tomahawk*, incorporated March 25, 1891 (ch. 58, Laws of 1891); second, because, with the existing indebtedness of the city, the proposed bond issue would make such indebtedness exceed the constitutional five per cent. limit; third, because the law authorizing the issue of the bonds is unconstitutional.

It was found by the court:

(5) That the assessed valuation of the taxable property of the city for the year 1894, fixed by the board of review of the city, was the sum of $444,549.50, and that the value of the taxable property of said city, as fixed and determined by the county board of Lincoln county, at its meeting November 15, 1894, pursuant to sec. 1073, R. S., was $485,545.

(6) That on the 12th of November, 1891, the city issued its municipal bonds, known as "waterworks bonds," in the sum of $15,500, bearing interest at the rate of six per cent. per annum, which were purchased and held by the state of Wisconsin at their par value. That there was unpaid on said bonds, between October 13 and December 17, 1894, the sum of $12,500, principal, and interest thereon at the rate aforesaid from November 12, 1893; and that $1,500 of the principal and one year's interest on the total unpaid principal became due November 12, 1894. That December 3, 1894, the common council made the following tax levies, among others, for the then ensuing year: Waterworks bonds, $1,500;

interest on the same, $660; bridge tax, $1,200; incidentals, $2,000; school fund for all purposes, $8,996.50; borrowed money, $2,500. That said taxes were collected after December 17, 1894, and the said sum of $1,500 above mentioned, and $660 for interest on the same, was paid to the state treasurer in February, 1895, and a further payment on the said bonds of $1,500 principal, and annual interest for the year ending November 12, 1895, was made on the day last named.

(7) That the board of school directors of the town of Rock Falls, Lincoln county, borrowed from the state, May 17, 1889, $6,665, to be repaid in annual instalments of $666.50 each, payable February 1st of each year, with interest at six per cent. per annum; and that December 17, 1894, there was unpaid on said indebtedness the sum of $2,666 of principal, with interest from May 17, 1894, and no more; and that $666.50 of principal and one year's interest became due February 1, 1895, prior to the commencement of this action. That, by request of the officers or agents of the board of school directors of Rock Falls, the county clerk of Lincoln county each year certified to the city clerk of the city of *Tomahawk* (the territory of which was taken from the town of Rock Falls) the amount of the state tax levied by the state of Wisconsin in the years 1892, 1893, and 1894, and certified by the secretary of state to the said county clerk, to pay the instalments of said debt and interest which became due February 1, 1893, February 1, 1894, and February 1, 1895, and taxes had been levied on the taxable property of the city of *Tomahawk* for the purpose of paying a proportion of said indebtedness. These, with other facts, were relied on as tending to show the assumption of a certain proportion of said debt by said city.

(8) That on November 23, 1894, the city borrowed of W. H. and J. W. Bradley $2,500, to be repaid with interest at seven per cent. within ninety days, and a promissory note therefor had been given by the proper authorities of the

city, and the item of $2,500 for borrowed money, in the tax levy already mentioned, was for the purpose of repaying said loan, which in fact was paid February 21, 1895.

(9) That on the 28th of November, 1894, the city was indebted to the Rice River Lumber Company in the sum of $175, for lumber to be used by the said city in repairing its streets, but this bill was paid January 21, 1895, and the city had at all times sufficient funds in its possession to pay the same.

(10) That on December 3, 1894, the common council levied on the taxable property of the city, for state and county taxes, the amount of $5,420.91, which was collected and paid to the county treasurer of Lincoln county in March and April, 1895.

(11) That in December, 1894, and prior to the 17th day of said month, the city had entered into a contract with S. M. Hewitt & Co. and the town of Rock Falls to build a bridge across the Wisconsin river, between the city of *Tomahawk* and the said town of Rock Falls, and that the city should pay for building said bridge, as its share, the sum of $1,200. That Hewitt & Co. entered upon the performance of said contract prior to the 17th day of December, and completed the same prior to the commencement of this proceeding; and the city paid said sum to Hewitt & Co., in February, 1895, from a tax levy for the payment of that sum December 3, 1894.

(12) That the city had entered into two contracts with one Garland for the extension of the waterworks system of the city, one made July 23, 1894, and the other September 25th of the same year; and that they were performed about the 11th day of December, 1894. That on the 17th of December, 1894, prior to the filing of the petition signed by resident taxpayers, the city paid to said Garland the balance due him under said contracts, and had at all times on hand funds available for that purpose, sufficient to pay all amounts

to accrue to him under said contracts as the same became due.

(13) That on December 11, 1894, the common council appropriated, out of funds then in the treasury, the sum of $400 for the erection of a pesthouse; and on December 29, 1894, city orders to the amount of $400 were issued to certain contractors who had been employed by said committee to construct said pesthouse, said contractors having commenced work on the same, December 14, 1894.

(14) That in the summer of 1894, one Sykes prepared plans and specifications for waterworks extension, for which he filed a bill for $64, which was disputed, but it was compromised January 1, 1895, and paid at the sum of $50; but the city had at all times on hand sufficient funds available to pay such demand.

(15) That prior to the 16th of November, 1894, the city contracted for the services of certain teachers in the city schools, by which they were to work at a stated price per month, the contract being good from month to month, and for no greater period; and under said contracts there became due to the teachers, December 21st, wages for the month ending on said day in the aggregate of $620, and on the same day said sums were paid to them by said city; the amount earned up to the 17th day of said month being $513.39. All the wages of teachers prior to said month had been paid as the same became due from month to month, there having been sufficient money in the treasury applicable to that purpose to pay them as the same became due.

It was further found that there had not been any vote of the electors or resident taxpayers of the city for the proposition to grant aid to the relator for the purposes mentioned in the petition, nor any vote whatever to issue bonds or subscribe for stock of the relator for that purpose, except as stated in said petition and acceptance by the taxpayers; that the common council never voted to accept said propo-

sition or subscribe for the capital stock of the relator, nor did it ever in any manner "authorize or direct the issue of bonds to the relator, in any sum whatever, for any purpose, or for the creation of any indebtedness against the city, by reason of the proceedings had and taken by the relator and the resident taxpayers, as before stated."

For the appellant there were briefs by *Curtis & Reid*, and oral argument by *Geo. Curtis, Jr.*, and *A. H. Reid.*

For the respondent there was a brief by *Henry C. Hetzel, Brown & Pradt*, and *James O'Leary*, city attorney, and oral argument by *Mr. Hetzel* and *Mr. Neal Brown.* They contended, *inter alia*, that a charter or special act passed subsequent to a general law repeals the latter so far as it is in conflict or inconsistent with it. Dillon, Mun. Corp. (4th ed.), § 88; 23 Am. & Eng. Ency. of Law, 422; Id. 430, and cases cited in note 4; *Isham v. Bannington Iron Co.* 19 Vt. 240; *State v. Clarke*, 14 Am. Rep. 471; *State v. De Bar*, 58 Mo. 395; *State v. Binder*, 38 id. 451; *Palmer v. State*, 2 Oreg. 66; *Tierney v. Dodge*, 9 Minn. 166; *Richardson v. Sheldon*, 1 Pin. 624; *Titcomb v. Union F. & M. Ins. Co.* 8 Mass. 326; *St. Johnsbury v. Thompson*, 59 Am. Rep. 731; *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 422; *In re Snell*, 58 Vt. 207; *Van Denburgh v. Greenbush*, 66 N. Y. 1; *Gowen v. Harley*, 6 C. C. A. 190; *State v. Stoll*, 17 Wall. 425. The legislative power in municipalities cannot be delegated to any other authority. It must be exercised by the municipality, either through the action of the whole body of electors, or through officers representing them. *Slinger v. Henneman*, 38 Wis. 504; *State ex rel. Att'y Gen. v. O'Neill*, 24 id. 149; *Post v. Pulaski Co.* 49 Fed. Rep. 628; *Mills v. Charleton*, 29 Wis. 400; *People ex rel. McLean v. Flagg*, 11 Am. L. Reg. (N. S.), 80, note; *People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *People ex rel. Board of Park Comm'rs v. Common Council of Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *People ex rel. D., W. & P. R. Co. v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480;

Atkins v. Randolph, 31 Vt. 226; *Harrington v. Plainview*, 27 Minn. 224; *Plainview v. W. R. Co.* 36 id. 505.

PINNEY, J. 1. The validity of subscriptions to the stock of railroad companies, and the issue of bonds in payment therefor, by towns, cities, and counties, when authorized by law, has in this state long been settled (*Phillips v. Albany*, 28 Wis. 357), and that it is not necessary that the question of subscribing for stock and issuing such bonds be submitted to a vote of the qualified electors of the town, city, or county. The legislature may confer directly the necessary authority, for such purposes, on the proper town, city, or county authorities to represent and act for the municipal corporation or organization. *Thompson v. Lee Co.* 3 Wall. 327; *Railroad Co. v. Otoe Co.* 16 Wall. 677. A proposition submitted on behalf of the railroad company, and properly accepted on behalf of the municipality, as by a vote of its electors, becomes a contract mutually binding (*Bound v. W. C. R. Co.* 45 Wis. 543; *Platteville v. G. & S. W. R. Co.* 43 Wis. 493); and the municipal authorities may be compelled to issue the bonds if the contract has been performed on the part of the railway company (*State ex rel. G. B. & M. R. Co. v. Jennings*, 48 Wis. 549).

It is contended, however, that the legislature could not lawfully provide that the assent of the municipality may be given by a majority of the signatures of the resident taxpayers, as specified in the statute, so as to bind it and render the contract obligatory on the city; that such consent could only be given by the body of electors, or through boards or officers elected by them according to law. The provision for giving the assent of the municipality by the signatures of a majority of the resident taxpayers has been in force for a period of nearly twenty-five years, and the question becomes extremely important, in consequence of the great interests depending upon it, rather than from any intrinsic

difficulty involved in its decision. Various acts of a similar character, for issuing bonds on the vote or petition of *taxpayers, taxable electors, or freeholders*, have been passed, and some of them put in use. P. & L. Laws of 1853, ch. 165, sec. 2; P. & L. Laws of 1856, ch. 132, sec. 7; Id. ch. 502, sec. 7; P. & L. Laws of 1858, ch. 162, sec. 4; Id. ch. 138, sec. 6; Laws of 1861, ch. 65, sec. 2; Laws of 1865, ch. 378, sec. 2; Laws of 1866, ch. 21, sec. 1; P. & L. Laws of 1871, ch. 287, sec. 1; Id. ch. 263, sec. 1. In 1872 the present act was passed (Laws of 1872, ch. 182, revised by ch. 289, Laws of 1873), and subsequently carried into the revision of the statutes in 1878 (secs. 945 *et seq.*).

The validity of a contract perfected in the manner stated has been frequently determined in the courts of several states, and so uniformly sustained that the question may, perhaps, be properly said to have been put at rest by contemporaneous legislative and judicial exposition. We have not been referred to, nor are we aware of, any provision of the constitution which forbids, expressly or by implication, the legislation relied on; but the argument against it resolves itself substantially into the position that the right of local self-government and the spirit of the constitution are opposed to it. Plenary power in the legislature, for all purposes of civil government, is the rule, and prohibition to exercise a particular power is an exception; and it is for those who rely on such exception to point it out. *People ex rel. Wood v. Draper*, 15 N. Y. 541. The making of such a contract and the issuing of bonds under it is regarded as the exercise of the power of taxation, for it can only be fulfilled by a resort to taxation, and its validity necessarily depends upon the power to levy the tax. Taxes are understood to be burdens or charges imposed by the legislature upon persons or property, to raise money for public purposes. Cooley, Const. Lim. *479. In *Loan Asso. v. Topeka*, 20 Wall. 660, it was said by MILLER, J., "that a decided preponderance of

authority is to be found in favor of the proposition that the legislatures of the states, unless restricted by some special provisions of their constitutions, may confer upon municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations; also to levy the necessary taxes on the inhabitants and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred." In all these cases the decision has turned upon the question whether taxation to pay such obligations was for a *public* purpose, and in this state this question was long since put at rest, as already stated. Counties, cities, and towns are public agencies, created with certain powers of local government, and with certain general powers for the better and more effectual exercise of the powers of the state government. Their existence is recognized by the constitution, but they are subject to the constitutional control of the legislature. *Levy Court v. Coroner*, 2 Wall. 501; *Board of Comm'rs of Hamilton Co. v. Mighels*, 7 Ohio St. 109; *People ex rel. Wood v. Draper*, 15 N. Y. 541; *Cheaney v. Hooser*, 9 B. Mon. 333; *Gorham v. Springfield*, 21 Me. 58; *Bank of Rome v. Rome*, 18 N. Y. 43. Taxation is essentially and wholly a legislative power, and while certain powers of taxation have been conferred on these local organizations, and local public officers chosen therein, there still remains in the state a reserved power of taxation, with authority on the part of the legislature to provide for its exercise, for public purposes, in such other manner as the legislature may prescribe, not forbidden by the constitution. The power to tax is universally acknowledged to be the strongest and the most pervading of all the powers of the government. In *Mills v. Charleton*, 29 Wis. 400–411, it was said by DIXON, C. J., that "the taxing power, when acting within its legitimate sphere, and unrestrained by positive constitutional provisions, is a far-reaching and unlimited power, which knows no stopping place nor mod-

eration of force until it has accomplished the purpose for which it exists."

The city, in this case, was a mere creation of the legislative power. It possessed no inherent power of taxation, and only such as the legislature conferred on it. The validity of the contract in question must necessarily depend upon the will of the state. Hence how the consent of the city should be given, whether by city officers, resident taxpayers, or by vote of its electors, was clearly a matter wholly in the discretion of the legislature, and, when given in the manner prescribed, a valid contract was created, and the performance of such contract by the city became, by reason of such consent, obligatory on the city. R. S. sec. 948; *State ex rel. G. B. & M. R. Co. v. Jennings*, 48 Wis. 549. This is in accord with the decisions of many of the most respectable courts in the country. *Duanesburgh v. Jenkins*, 57 N. Y. 177, 189–194; *Williams v. Duanesburgh*, 66 N. Y. 140, 141; *Bennington v. Park*, 50 Vt. 195; *People ex rel. Blanding v. Burr*, 13 Cal. 343, 357–359; *Queensbury v. Culver*, 19 Wall. 84; *Bernards v. Morrison*, 133 U. S. 523; *Scipio v. Wright*, 101 U. S. 665; *Van Hostrup v. Madison City*, 1 Wall. 291; *Woods v. Lawrence Co.* 1 Black, 404, 405; *Mercer Co. v. Hacket*, 1 Wall. 83; *Mentz v. Cook*, 108 N. Y. 504, 509; *Rich v. Mentz*, 134 U. S. 632, 644. The vesting of the power to consent to such a contract in the resident taxpayers, so deeply interested in the enterprise and in the public welfare of the city, and who are to contribute of their means to pay the debt incurred, is clearly much more judicious and conservative than to provide that it shall be given by the qualified electors. There is no provision in the constitution which, either expressly or impliedly, forbids the legislature to authorize the taxpayers of the town, city, or county, to represent it and act for it in making a contract in relation to "something new and unusual, not constituting any part of the ordinary general powers of such local organizations,

like that of isuing bonds in aid of railroads, sustained in *Sheboygan Co. v. Parker*, 3 Wall. 93." Per PAINE, J., in *State ex rel. Keenan v. Milwaukee Co.* 25 Wis. 351. In *Single v. Marathon Co.* 38 Wis. 372, it was said by LYON, J., that, "were the question a new one, I apprehend it would not be difficult to show that the purchasing of stock by towns or counties does not pertain to the system of town and county government, and hence that special acts of the legislature conferring powers to do so are not within the constitutional provision under consideration," requiring a uniform system of town and county government. It is firmly established in the cases already cited that the making of a subscription to the stock of railroad companies, and issuing bonds in payment therefor, are transactions not within the scope of the purposes for which towns, cities, or counties are created. They have no authority, it is clear, to make such contracts, in the absence of some special enabling act authorizing the same.

2. The general law under consideration was in force at the time the city charter (Laws of 1891, ch. 58) was enacted, and it undoubtedly applied to cities that might thereafter be incorporated, as well as to those in existence at the time, unless repealed by implication. No express repeal is relied on. There is no repugnancy between the general law and the city charter. They respectively apply to different subjects, namely, the former to matters not within the ordinary scope and purpose of the city charter, and the latter wholly to matters of strictly municipal administration. The restrictions contained in the charter against contracting debts are, as a matter of fair implication, to be limited to the contracting of debts for strictly municipal purposes. It is well settled that repeals by implication are not to be favored, and "where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court (no purpose to repeal being clearly expressed or indi-

cated) is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended, by a later statute, to repeal a prior one on the same subject, unless the last statute is so broad in its terms, and so clear and explicit in its words, as to show that it was intended to cover the whole subject, and therefore to displace the prior statute." *Frost v. Wenie*, 157 U. S. 46–58; *U. S. v. Tynen*, 11 Wall. 88–93; *Henderson's Tobacco*, 11 Wall. 652; *Red Rock v. Henry*, 106 U. S. 596–601; *King v. Cornell*, 106 U. S. 395, 396. In all such cases we ought to seek such construction as will reconcile them together. *Attorney General ex rel. Taylor v. Brown*, 1 Wis. 525. The rule, as thus stated, is in accordance with the general result of the authorities on the subject. Each chapter must prevail as to its own subject matter (*Woodbury v. Shackleford*, 19 Wis. 55; *Schieve v. State*, 17 Wis. 253), and special provisions relating to a particular subject control general ones to which they are repugnant (*Western Bank v. Tallman*, 17 Wis. 530). Upon well-settled rules, considering the scope and object of the two statutes, there is no necessary conflict or inconsistency in their provisions, and both, therefore, may well be held operative as to the city of *Tomahawk*.

The provisions of sec. 4986, R. S., to the effect that all the laws contained in the Revised Statutes "shall apply to, and be in force in each and every city and village in the state, so far *as applicable and not inconsistent* with the charter of any such city or village; but when the provisions of any such charters are *at variance* with the provisions of the Revised Statutes, the provisions of such charters shall prevail, *unless a different intention be plainly manifested*,"—lead to the same result, namely, that, where the provisions of the general law are not inconsistent or at variance with the charter, the provisions of each will be construed to be operative as to all matters within its purview.

There is no reason, therefore, for reading the general law

into the city charter. It applies wholly to matter untouched by the charter, and the provisions of the general law and the statute, not being inconsistent, may well subsist and be executed together; for we think that the provisions of the charter, relied on by the defendant, cannot properly be considered as a restriction of the power of the city to issue bonds in exchange for the stock of a railway company, under the general law. The charter provisions are that "the common council shall have authority, by ordinances, resolutions, or by-laws, to manage and regulate the finances," and "to adopt all legal and requisite measures for levying taxes and assessments, general and special" (Laws of 1891, ch. 58 [City Charter], subch. V, sec. 12); that "the common council of said city shall, by proper resolution, levy all taxes to be raised in said city, itemizing the amount so as to show the amount raised for general and special purposes" (sec. 15, subch. V); that, "in addition to the amount of taxes for general city purposes, special taxes may be levied for the purchase of fire engines, cemetery grounds, public squares, and lands for railway purposes, including depots, switch yards, side tracks, and such other purposes as are of public utility; but no such tax shall be levied, unless the same shall first be recommended by the common council, and afterward submitted to a vote of the people, and approved by them," etc. (subch. IV, sec. 11). This provision seems to limit and explain the one which follows, and to show that it extends only to debts or liabilities of any kind, name, or nature, for general municipal purposes, namely, that "no debt shall be contracted against the city, or certificate of indebtedness be drawn upon the city treasury, unless the same shall be authorized by a majority of all the members-elect of the common council," etc.; "*provided*, that the common council shall not, *in any case, or under any pretext, or for any purpose whatever*, contract debts or liabilities of any kind, name, or nature, exceeding the amounts which it is authorized by the provisions of this act *to levy*

for the current year." Subch. IX, sec. 3. By subch. XIII, sec. 19, the common council has authority "to issue bonds of said city for such public improvements as shall be duly authorized by said common council by ordinance," adopted by a vote of three fourths of its members, but not to exceed five per cent. of the assessed valuation, etc.; the issuing of the bonds to be submitted to and approved by a vote of the people. This is an affirmative statute merely, and does not prevent the city from exchanging its bonds for stock of the railroad company, up to the prescribed limit, should a valid contract therefor be made under the general law. It is a provision to secure public city improvements. The construction and effect of these various provisions of the charter is to be arrived at by considering them together and in their relation to municipal purposes and the ordinary administration of the affairs of the municipality.

The case of *Perrin v. New London*, 67 Wis. 416, is much relied on by the respondent as showing the invalidity of the contract in question, but we think that the cases are distinguishable. In *Perrin v. New London*, 67 Wis. 417, the charter declared that said village should have no power, except when specially authorized thereunto by law, to borrow money, etc., "nor shall said *village* incur any debt or liability, in any year, greater than the amount of tax allowed by this act to be raised in said village in the year in which such debt or liability was incurred." In 1872, when the bonds there in suit were issued, the charter conferred no authority upon the village, or its trustees, to raise money by taxation to pay such bonds in that or any other year, and the special act of 1867 (ch. 93, P. & L. Laws of 1867), under which the bonds in suit were issued, contained no provision for levying a tax to pay the principal of the bonds, but only annual interest thereon. The limitation in that case was on the power of the *corporate body*, and the court proceeded upon the theory that the bonds would be void unless there

was in the charter, or in the special act, authority to levy a tax to pay them. Here we think that by the fair construction of sec. 3, subch. IX, ch. 58, Laws of 1891, relied on, the limitation was only *upon the common council*, in contracting debts for ordinary *municipal* purposes. The section provides, in substance and effect: (1) That no such debt shall be contracted, unless authorized by a majority of all the members-elect of the common council, the vote to be entered by ayes and nays; and (2) the proviso to the section limits the power of the common council, so that it should not "in any case, or under any pretext, or for any purpose whatever, contract debts or liabilities of any kind, name, or nature, exceeding the amounts which it is authorized by the provisions of this act to levy for the current year,"—showing that the entire section is a restraint only on the common council. The provision in the charter for issuing bonds, not to exceed five per cent. of the assessed valuation, for public improvements, and in the manner stated by subch. XIII, sec. 19, shows that the first limitation was not absolute, but was to have only the force and meaning already stated. Consequently, the power of the city, under the general law, by consent of its resident taxpayers, to make the contract in question, as well as the power of the city to issue bonds for public improvements, still remained, notwithstanding the provisions of sec. 3, subch. IX. In *Perrin v. New London*, *supra*, the prohibition was unqualified, and its broad general meaning was neither explained, modified, nor controlled by other provisions, as here, in the same or other sections of the charter. The proper rule of construction in such cases is recognized in *Perrin v. New London*, and in *Quincy v. Cooke*, 107 U. S. 549, and *Quincy v. Jackson*, 113 U. S. 332–336. The application and meaning of sec. 3 of subch. IX of the city charter, for the reasons indicated, must be restricted to debts for strictly municipal purposes.

3. The constitutional amendment to sec. 3, art. XI, pro-

viding that "no city . . . shall be allowed to become indebted in any manner, or for any purpose, to any amount, including *existing* indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness," was a sufficient limitation of the amount of indebtedness that might be contracted so as to satisfy the provisions of sec. 3, art. XI; but the power and duty of the legislature remained to impose still other restrictions or regulations, and several such have been imposed by the general law under consideration. R. S. secs. 942–947. Whether the power of the municipal corporation to tax, to borrow money, to contract debts, and lend its credit, has been sufficiently restricted, is understood to be a question within the discretion of the legislature; and its action in the premises is not reviewable in the courts. *Bank of Rome v. Rome*, 18 N. Y. 38. Some of the provisions in the city charter which have been considered are restrictions on the power of the city, in these respects, as to debts of a strictly municipal character.

4. The proposition submitted to the resident taxpayers, and accepted by the signatures of a majority of them, the statute declares, "shall be deemed obligatory as a mutual agreement on such company and on such municipality; . . . and the common council of such municipality shall, as soon as may be, cause subscription to be made on the books of such company for such stock or bonds thereof as were proposed to be issued, and shall provide by ordinance or resolution for issuing such bonds of the municipality, in accordance with such agreement, by the proper officers, and the deposit of the same in escrow, if it be so agreed;" and it had been so agreed in this case. "But no such bonds shall be delivered, or be valid if delivered, until the road, to aid in the construction of which such bonds were voted, shall have been completed and in operation by the passage

of cars continuously from one terminus to such point as such company shall have agreed to construct the same, in consideration thereof." [R. S. sec. 948.] By the amendment to sec. 3, art. XI, of the constitution, it is provided that "any city . . . *incurring* any indebtedness" as stated, in such amount, "shall, before doing so, provide for the collection of a direct annual tax, sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." The contract is one for creating an indebtedness on the part of the municipality, upon conditions precedent, namely, the completion of the road and the legal capacity of the city at that time to become indebted on the bonds held in escrow. The phrases "incurring such indebtedness," and "incurring any indebtedness as aforesaid," manifestly refer to the time when the contract is performed by the act of the company and it is entitled to the delivery of the bonds; and they must receive such construction as will be consistent with the nature of the transaction and effectuate the intention of the parties. To incur an indebtedness is to become liable for or subject to an indebtedness. The incurring of the indebtedness in the present case consists of several steps or proceedings, under the statute, resulting in the putting of bonds in escrow which are not to be delivered, or be valid if delivered, until the road is completed as stipulated. This is evidently the point at which the indebtedness is legally consummate. In *Keystone Lumber Co. v. Bayfield*, 94 Wis. 491, it was held that no tax could be levied to pay interest on bonds held in escrow, to be delivered in aid of a railroad at its completion, but which had not been completed. Interest could not accrue on bonds until they should become legal obligations for the payment of the sum named therein, and it must logically follow that the time of the accruing of the indebtedness is the time stipulated for the delivery of the bonds. We think, therefore, that by the

"last assessment for state and county taxes previous to the incurring of the indebtedness" is intended the last assessment in the municipality, as equalized by its board of review, next before the time fixed for the completion of the road and the delivery of the bonds. The record does not give this date, but as the road was to be completed by December 1, 1895, it is a fair inference from the pleadings and finding that it was completed by that time. The assessment intended by the constitutional provision is the assessment of the town, city, or village, as equalized by its board of review, made for the purposes of general taxation, and there is no other assessment, within the meaning of this provision, "for state and county taxes." The so-called "state assessment" is made on the third Monday of May, before the local assessments are made, and "from all the sources of information accessible to the board, as a means of apportioning state taxes between the several counties." A valuation of the property in the several counties is thus arrived at. R. S. sec. 1069. At the annual meeting of the county board in November, the local assessments, having been completed in the meantime, with statistical statements, are laid before the county board, and it is then "to determine and assess the *relative* value of all the taxable property in each town, city, and village," as a means of apportioning the state and county taxes between such towns, cities, and villages; but the taxes therein are computed and extended upon the local assessments, as determined by the local assessors and boards of review. The object of the provision, by which resort is to be had to the "last assessment for county and state taxes," is to prevent a resort to special assessments, which the legislature might authorize for the purposes contemplated in the amendment only, and as a safeguard against possible evasion of its true intent and purpose. There is no assessment distinctively made for county taxes, nor any distinctively made for state taxes, in any other sense than has been stated;

and to hold that there are such would be to render the provision indefinite and uncertain as to which so-called "assessment" was intended. The last assessment of the town, city, or village as fixed by the local board of review, upon which county and state taxes may be extended, as well as local taxes, is clearly the assessment intended. R. S. secs. 1073, 1076, 1078.

5. In order to ascertain the amount of the indebtedness of the city existing at the time the railroad was completed and the bonds were required to have been delivered, so as to determine whether, after deducting such indebtedness from five per centum on the assessment of 1895, as equalized by the city board of review,— that being the limit of indebtedness the city has power to contract, under the amendment to sec. 3, art. XI, of the constitution,— the city had power to issue the bonds in question, not only municipal bonds, but all forms of city indebtedness, must be deducted, except warrants for money actually in the treasury and contracts for ordinary expenses within the current revenue. In *Earles v. Wells*, 94 Wis. 285, where this question was fully considered and discussed, it was held that "so long as the current expenses of the municipality are kept within the limits of the moneys and assets actually in the treasury and the current revenues collected or in process of immediate collection, the municipality may be fairly regarded as doing business on a cash basis, and not upon credit, even though there may be for a short time some unpaid liabilities. But the moment an indebtedness is voluntarily created 'in any manner or for any purpose,' with no money nor assets in the treasury, nor current revenues collected or in process of immediate collection, for the payment of the same, that moment such debt must be considered in determining whether such municipality has or has not exceeded the constitutional limit of indebtedness." It follows, therefore, that the amount of water bonds outstanding at the time of the completion of

the road, for the payment of which no certain and adequate provision had been made from the funds in the treasury or from any tax in process of immediate collection, would have to be deducted, but not the amount of state and county taxes levied on property in the said city, nor any part of the loan from the state of Wisconsin to the board of school directors of the town of Rock Falls, in Lincoln county. The facts found did not justify the conclusion that the city is indebted in any sum on account of such loan. No statute authority has been shown for apportioning said indebtedness between said city and the board of school directors of the town of Rock Falls, and, if any exists, no such apportionment of such indebtedness appears to have been made. In the absence of any such showing, the indebtedness for that loan is the indebtedness only of the corporation contracting it, and the facts found do not justify the conclusion that the city is indebted in any sum whatever on account thereof. All other items of alleged city indebtedness were either paid before December 1, 1895, or there were sufficient funds and resources in the city treasury to discharge the same in the course of current administration of the financial affairs of the city.

The judgment of the circuit court dismissing the proceedings herein upon the ground that the contract made by the relator with the city for the issue of bonds and subscription to its capital stock was null and void, is erroneous and must be reversed.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

THE STATE EX REL. SMITH, Respondent, vs. THE BOARD OF EDUCATION OF THE CITY OF EAU CLAIRE, imp., Appellant.

March 23 — April 30, 1897.

Public schools: Expulsion of pupil: Tuition fees: Residence for school purposes.

1. The wrongful exaction of a tuition fee by the teacher and principal of a school as a condition of allowing a pupil to remain in school, and the payment of such fee under protest, are not equivalent to an expulsion of the pupil from the school, where the school board alone has the power of expulsion.
2. Where a child of school age is sent or goes into a school district with the primary purpose of securing a home with a particular family, he is entitled to the benefits of the public schools in that district free of charge; but if his primary purpose in locating therein is to participate in the advantages of the public schools he must pay tuition, even though he has some other incidental purpose to subserve while so attending school.

APPEAL from a judgment of the circuit court for Eau Claire county: W. F. BAILEY, Circuit Judge. *Reversed.*

The facts are stated in the opinion.

For the appellant there was a brief by *Doolittle & Shoemaker*, and oral argument by *L. A. Doolittle.*

A. C. Larson, for the respondent.

CASSODAY, C. J. The plaintiff's petition for a *mandamus* states, in effect, that at the times mentioned he was a resident householder and taxpayer in the Eighth ward of Eau Claire; that Ingvald Olson, a minor of the age of eleven years, had previously been apprenticed to him, and had lived with and been a member of his family continuously since December 23, 1892, and that he had furnished Olson with the necessary school books, utensils, and apparatus; that Olson had attended the school in the Eighth ward since the commencement of the school term of 1893, up to March 30, 1894, on which last-mentioned date he was suspended, dismissed, and

expelled from said school by the teacher in the room where he belonged, and by the principal of the school, under and by virtue of a certain pretended resolution passed by the board of education of that district March 20, 1894, but without lawful authority or right, and without legal or reasonable excuse, and contrary to the wish of the plaintiff; that said teacher, principal, and board of education had each and all refused to readmit the said Olson as a pupil in the school unless he should pay a certain sum as tuition fee; that March 29, 1894, the plaintiff tendered the teacher of the room where Olson attended the required amount of tuition fee, but that she refused to receive said money, and informed the plaintiff that said money should be paid to the city treasurer; that March 30, 1894, when said pupil was so suspended, dismissed, and expelled from said school, the principal of the school was again tendered the amount for tuition, under protest, but she refused to receive it and admit him as such pupil, and illegally excluded him therefrom. The substance of such statements is repeated in the alternative writ of *mandamus* issued from the circuit court.

To that writ the board of education made answer and return to the effect that Olson was not a resident of the school district, and was not entitled to attend any public school in the city without payment of tuition therefor; that an order had been duly and regularly made by the board excluding from the privileges of the schools of the district any and all pupils who were not residents of said school district, unless such nonresident pupils should pay to the city treasurer the tuition fee therein named,— and denied any knowledge, or information sufficient to form a belief, as to the truth of any of the allegations in the petition therein contained, except as to the allegation that the said Olson had been suspended, dismissed, and expelled from the Eighth Ward school of the city; that said allegation was thereby denied; and that said board of education alleged that the said Olson had

not been suspended, expelled, or dismissed from said school, or from any public school in the city of Eau Claire.

The said principal of the school made answer and return to the effect that Olson had not been by her expelled, suspended, or dismissed, or otherwise excluded from the Eighth Ward school in the city, or from any school in the city, and that she had no right, power, or authority to readmit to any school in the city any pupil who may have been suspended, dismissed, or expelled therefrom, and that all the right, power, or authority which she had exercised with regard to the attendance at school was delegated to her by the board; that said Olson had tendered a tuition fee, and demanded a receipt therefor, but that she refused to give the receipt or take the money. The said teacher of the school made answer and return to the effect that she had no knowledge or information sufficient to form a belief, as to what relationship and what contracts might exist between Olson, his parents, and the plaintiff.

Upon the stipulation of the parties, all the issues of fact raised by the return of the board were ordered to be heard and determined by a jury. Thereupon the court ordered two questions to be submitted to the jury, to the effect—First, as to whether Olson, during the time mentioned, was a legal resident of the city for school purposes, and as such entitled to attend the public schools free of charge and without paying tuition therefor; and, secondly, as to whether Olson was illegally expelled from the Eighth Ward school in the city March 30, 1894. At the close of the trial the jury returned a verdict to the effect that they found that Olson was entitled to attend the public schools of the city free of charge. But the jury entirely failed to answer the second question submitted,—as to whether Olson had been illegally expelled, or expelled at all. The judgment of the circuit court, signed by the presiding judge, recites that the court had found from the undisputed evidence that Olson

was illegally expelled from the public schools of the city March 30, 1894, and accordingly granted the peremptory writ of *mandamus*. From that judgment the board of education brings this appeal.

1. The real issue for determination was whether Olson was illegally expelled from school, and yet that question was taken from the jury in the manner indicated, and on the ground that the undisputed evidence showed that he was so illegally expelled. That question really included the question which was submitted to the jury under sec. 3452, S. & B. Ann. Stats., as to whether Olson had a legal residence in the city, such as entitled him to attend the public schools. After a careful examination of the evidence, we are convinced that it is insufficient to sustain a finding that he was ever expelled at all,—much less that he was illegally expelled. Olson testified to the effect that he was turned out of school by a teacher in the spring of 1893, and then, after remaining out of school for three or four days, he "commenced to go to school again, and continued until about a year after;" that is to say, until March 30, 1894, when it is found that he was expelled again. The strongest evidence in that direction is that on the morning of the day and year last mentioned his teacher sent him home, with a note from her to the plaintiff to the effect that she was obliged to send him home, as he had not presented his receipt; that, if the plaintiff intended to pay his tuition on that day, to let her know, and he would be allowed to come back on the afternoon of the same day. He further testified to the effect that he took that note from his teacher to the plaintiff at the forenoon recess; that, upon delivering such note to the plaintiff, he turned around and went back to the school, and got there before 12 o'clock; and that he continued to attend school from that time until the end of the term that summer. It is hardly necessary to say that neither the teacher nor the principal of the school had any

power to expel Olson. That power was vested in the school board, exclusively. Sec. 439, R. S.; *State ex rel. Burpee v. Burton*, 45 Wis. 150; *State ex rel. Bowe v. Board of Education*, 63 Wis. 234. There is no evidence that the board did anything towards expelling Olson. The plaintiff testified to the effect that, upon receiving from Olson the note so sent by his teacher, he went and paid the tuition, $12, under protest. Assuming that such tuition was wrongfully exacted and wrongfully received, and that the plaintiff has a legal remedy therefor, yet it is very certain that such facts furnish no ground for sustaining this judgment. The anomaly about this judgment consists in the fact that it compels the board and the principal and the teacher to do what they had already voluntarily done. The judgment seems to go upon the theory that if the tuition fee was wrongfully exacted and received upon being paid under protest, then it was equivalent to and conclusive evidence that Olson had been expelled from school. We do not understand such to be the law.

2. The court charged the jury "that if the evidence satisfies you that the boy came to Eau Claire to reside permanently with his uncle, who was to clothe him, give him a home, and who had control of him, and the benefit of the public schools was not the *sole and only* purpose, then it is that you should find the issue presented in favor of the relator." Under this charge the jury were bound to find that Olson had the right to attend the public school without paying any tuition, unless they found that his presence in the city was for the sole and only purpose of attending the public school. This we think was error. The constitution provides that district "schools shall be free and without charge for tuition, to all children between the ages of four and twenty years." Sec. 3, art. X. This court has held "that when the legislature has provided for each such child the privileges of a district school, which he or she may

freely enjoy, the constitutional requirement in that behalf is complied with. This the legislature has done." *State ex rel. Comstock v. Joint School District*, 65 Wis. 636, 637. So this court has held, in effect, that where a child of school age is sent or goes into a certain school district with the primary purpose of securing a home with a particular family, then he is entitled to the benefits of the public school of such district free of charge. *State ex rel. School Dist. No. 1 v. Thayer*, 74 Wis. 48, 59. But, if the primary purpose of the locating in such district is to participate in the advantages which the public schools therein afford, then he must pay tuition, even though there be some other incidental purpose to be subserved while so attending school therein. *Id.*

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

96	100
101	382
96	101
102	346
96	100
s110	407

CLAUSEN, Appellant, vs. HALE, Assignee, Respondent.

April 7 — April 30, 1897.

Appeal: Preponderance of evidence.

Findings of the trial court cannot be disturbed unless they are clearly against the preponderance of the evidence.

APPEAL from an order of the circuit court for Kenosha county: FRANK M. FISH, Circuit Judge. *Affirmed.*

This is a claim against an insolvent estate. For many years prior to August 26, 1895, Dan Head & Co., a banking corporation organized under the laws of this state, carried on a general banking business at Kenosha, one Urban J. Lewis being the cashier of said bank. On said 26th day of August the said bank made a voluntary assignment of all its property, for the benefit of its creditors, to defendant, *Hale*,

who qualified and entered upon the duties of his trust. Within the proper time the claimant, *Clausen*, filed his claim with the assignee against said estate, in the sum of $1,000, for money loaned. The assignee filed objections to said claim; claiming, in effect, that the $1,000 alleged to have been loaned by *Clausen* to the bank was in fact loaned to Urban J. Lewis personally, and not to the bank. The action was tried by the court. Prior to the trial of the action the cashier, Lewis, died, and his testimony was consequently never taken.

From the evidence upon the trial it appeared that for some time prior to August 8, 1894, *Clausen* had more than $1,100 on deposit upon open account in said bank, but upon said 8th day of August, 1894, he signed and delivered to Lewis a check, prepared by the latter at the counter of the bank, for $1,000, in words and figures as follows:

"Kenosha, Wis., 8-8, 1894. No. 60

"Dan Head & Co., Bankers:
"Pay to the order of
"Loan $1.000.00
"One Thousand .....Dollars.
"JOHN CLAUSEN."

Mr. Lewis being dead, no testimony was permitted as to the conversation which the claimant then had with him at the time of the giving of the check. Lewis, the cashier, also wrote upon the stub of the check the following words and figures:

"No. 60.	Order Loan
Aug. 8.	for Bk."

The claimant took no other evidence of indebtedness. Upon the books of the bank, and upon the bank book of the claimant, this check for $1,000 was charged against the claimant. Upon the 1st day of February, 1895, the claimant was credited upon his bank book, "Int. to Feb. 1st, 1895, $30.00." Upon July 1, 1895, he was also credited, "Int., Feb. to July 1st, 1895, $25.00." On the 2d day of Septem-

ber, 1895, the claimant, *Clausen*, called at the bank, and desired the papers in the bank which belonged to him. The assignee, *Hale*, made an examination of the papers in the vault, and found a package with the claimant's name upon it. The papers contained in the package were then examined, and found to be a note by Urban J. Lewis for $1,000 dated May 6, 1895; also, certain certificates of bank stock in the name of Mr. Lewis, being eight shares in Dan Head & Co.'s Bank, and two shares in the Bank of Antioch. Upon the note was an indorsement stating that the note was secured by the bank stock as collateral. *Clausen* received the papers and gave a receipt for them, stating at the time that they were not what he expected. Within a few days thereafter, *Clausen's* attorney tendered back the note and collateral, but the assignee refused to receive them. Upon the trial the note and collateral were brought into court and tendered back to the assignee.

The court found, as matter of fact, that the $1,000 loan was made to Lewis and not to the bank, and disallowed the claim, and the claimant appealed.

For the appellant there were briefs by *Baker & Baker*, of counsel, and oral argument by *N. L. Baker*.

For the respondent there was a brief by *Cavanagh & Fisher*, attorneys, and *Charles Quarles*, of counsel, and oral argument by *Peter Fisher*.

WINSLOW, J. The testimony in this case as to the real nature of the transaction between Lewis and the claimant is necessarily very meager. Mr. Lewis being dead, we do not know his version of it, and the statute excludes the claimant's version. Some of the facts in the evidence point strongly to the conclusion reached by the trial court. It may be conceded that some of the facts rather tend to support the opposite theory. It is a case where the vital findings or inferences of fact must be based upon somewhat unsatisfactory

and fragmentary evidence, but we cannot say that these findings are clearly against the preponderence of the evidence; hence they cannot be disturbed.

Some contention was made to the effect that the claimant, when called as a witness for the defense, was examined as to the transaction between him and Lewis, and, hence, that he should have been permitted to answer questions which his counsel afterwards put to him with regard to what was said and done at that interview with Lewis. Careful examination of the testimony shows, in our judgment, that no question was allowed to be answered as to the interview in question.

By the Court.— Order affirmed.

SMITH and others, Respondents, vs. YOUMANS and others, Appellants.

April 7 — April 30, 1897.

Waters: Mill-dams: Raising of waters in lake: Right of riparian owners to have artificial level maintained: Abandonment of easement: Landlord and tenant.

1. Where the owner of a mill-dam at the outlet of a lake has, for a length of time sufficient to give him a prescriptive right, maintained the waters of the lake at such a height that they have covered the low marshy shores and extended to the high banks, thereby rendering the adjacent lands desirable for use as summer resorts, the riparian owners, who have for the same period enjoyed the advantages of such artificial level of the waters and in reliance upon its maintenance have improved their property at great expense for the use mentioned, have on their part an easement to have the waters kept at said higher level and may prevent the lowering thereof to their injury by the owner of the dam,—at least so long as he does not abandon or surrender his easement to flood the lands.

[2. *It would seem* that the owner of the dam in such a case may abandon his easement of flowage so as to escape all liability *at law* for consequential damages to the owners of the flooded lands by reason of the lowering of the level of the lake, unless he is bound by law or agreement to maintain the higher level of the waters in the lake.]

3. The lessee of a dam at the outlet of a lake, who is also the proprietor of another dam lower down on the stream, has no other or greater rights than his lessor in respect to lowering the level of the waters of the lake.

APPEAL from a judgment of the circuit court for Walworth county: FRANK M. FISH, Circuit Judge. *Affirmed.*

This is an action to restrain the defendants from in any way or manner drawing down or lowering the water in Lake Beulah, so called, and is brought by a large number of riparian proprietors on and along the waters of said lake against the owners and lessee of a certain dam at or near the outlet, whereby the waters of the lake were raised to a sufficient level to create a water power for milling purposes. Upon a trial of the issues joined the following facts were found, in substance:

Lake Beulah, as it now exists, originally consisted of two meandered lakes, which were separated by a strip of marsh about eighty rods wide, through which ran a small stream. The outlet of the more northerly of the lakes was by a small stream called Beulah river, which runs northerly and then easterly until it empties into Mukwanago creek, and said creek runs into Fox river. In 1838 a dam was built across the outlet of said lake at about the point where it left the lake, and the waters of the lake were raised a few feet, creating power for a saw-mill erected at the dam. After 1846, and before 1852, the original outlet was closed by an embankment, and has ever since so remained, and an artificial outlet to said lakes was created, at which point another dam was created, raising the waters in said lake to the height of six feet above their natural level, and eighteen inches higher

than by the former dam, creating a body of water known as Mill lake, and a new and artificial outlet for the said lakes, so that their waters, after passing over such dam, flowed by a new channel into said Beulah river, and in consequence of such dam the waters of the said two lakes were so raised as to flood to a considerable depth the marsh land formerly separating them, and making of them one body of water upwards of three miles in length, and varying in width from a quarter of a mile to one mile and a quarter, with an area of about 900 acres. All these changes were made by Ball & Mower, the remote grantors of H. A. Youmans, under and through whom the defendants claim their rights and interests; and Ball & Mower built upon a site near said dam a grist mill, which was used and operated by the power thus provided until it was destroyed by fire in 1876. The owners of the said dam and mill site at all times thereafter until shortly before the commencement of this action maintained the level of the water in said lakes at the point to which it was raised by said dam, save only as it was raised by freshets or unusual rains, or was lowered, as hereinafter stated, by draft of water through the said dam for use at said mill.

By the construction and maintenance of said dam and such consequent raising of the level of waters in said lakes, portions of the lands owned by certain of the plaintiffs and the grantors of certain others of them were flowed and submerged by such dam owners continuously, adversely, and uninterruptedly, and notoriously, exclusively of any other right, under claim of right for more than forty years, and at all times during that period the said level to which the waters were so raised by said dam was substantially and constantly maintained; so that said Youmans and his said grantors and his heirs and devisees acquired a right by prescription to so flow said lands, both as against the owners of lands bordering on said lakes and as against riparian owners below said lands. One effect of the construction of said

artificial outlet, and the diversion thereto of the natural flow of the waters of said lakes, and the construction and maintenance of said dam and embankment, was to deepen the waters of the lakes, and set said waters up and back against the hard and higher banks, and to make said lakes navigable for row boats, small sail boats, and steam launches, and to make the banks eligible and desirable sites for summer cottages and summer resorts, and to make said lakes a desirable place for fishing, boating, and recreation, and to make the margin of the lake touch the grassy banks and submerge the boggy and marshy shores, as they before existed, and to render the banks readily accessible by small row and pleasure boats.

About the year 1888, and from time to time thereafter, sundry of the plaintiffs, relying upon said conditions and the level of the lake as then existing and as having so uniformly existed for more than forty years, built summer homes for themselves and families, or summer resorts for recreation, and purchased divers lots and parcels of land fronting and bounded on said lakes for that purpose, and made divers and sundry valuable improvements on said lots to that end, as did many other persons. Certain other plaintiffs named owned lots and lands bounded by said lakes, and had owned the same from an early day. Said lands, for agricultural purposes, were worth not more than $50 per acre, but for the purposes aforesaid, with the level of said lakes as thus maintained, were worth from $1,000 to $2,000 per acre.

The dam belonging to the defendants *Youmans*, *Haight*, and *West* consists of an embankment of earth, with two openings, one for a flume and the other for a waste weir, and are planked on the bottom and sides, and after the destruction of the mill, and until a short time before the action was brought, were kept closed by bulkheads, backed up with gravel; and after the destruction of the mill in 1876 the power created by the dam had not been used. The defend-

ant *John Howitt* is, and for many years has been, the owner of a grist mill at Mukwanago, upon a stream into which said Beulah river empties, about five miles below said dam, which is, and for forty years past has been, driven by water power created by a dam across the said stream; and said *Howitt*, September 16, 1891, took from H. A. Youmans, then the owner of the dam and mill site at the foot of said lakes, a lease of the water power and water rights there created, and which still remained in force, and by it he was to expend a certain sum annually on the dam, flumes, and weirs of said water power, and was to do certain other work thereon.

If the bulkheads were to be removed, and the water allowed to run freely through said dam, the level of the water in Beulah lake would be drawn down to a point over three feet below the lowest point to which the water was drawn in the operation of the mill formerly there maintained; and, if the dam should be removed, the said waters would fall to a point four feet further. The lowest point to which the waters were drawn or could be drawn consistent with the operation of said mill, was a point thirty-three inches above the floor of the flume where said bulkhead crosses the same in the western opening in said dam; and the waters of the lake were continuously maintained at that point, until the defendants took out the bulkheads, a short time before this action was commenced, and drew down the waters of the lake to the level of the floor of said flume, to the great injury of the plaintiffs. Lowering the waters of said lake will substantially impair the value and availability of the parcels and lots of land owned by the plaintiffs and bounded on the lake; the waters will recede from its banks, and in almost all places strips of slimy, boggy, and marshy shore will be uncovered, preventing access by boats to the plaintiffs' piers, and will substantially impair, and well-nigh destroy, the beauty of the lake, and its adaptation and avail-

ability for summer residences and summer resorts, and make the vicinity unhealthful, and render the plaintiffs' improvements practically valueless for the purposes for which they were constructed.

Shortly before the action was commenced, said bulkheads were replaced to the height of two feet or more, and so that the waters of the lake rose and overflowed the bulkheads.

The plaintiffs asked judgment that the defendants, their agents, etc., be perpetually restrained from in any way raising, taking out, or removing from the said dam any of the bulkheads or waste or flash boards in or on the same, and from in any way throwing down, lowering, or opening the dam, and from in any way interfering with or drawing down the water in Lake Beulah. The defendants insisted upon their right to use and withdraw the waters of said lakes according to their needs and discretion. Judgment was given perpetually restraining the defendants, their agents, etc., from doing any of the acts mentioned so as to permit or allow the flow of water from the lake at a level below the point named, thirty-three inches above the floor in the flume, etc., and for costs; from which the defendants appealed.

For the appellant *Howitt* there was a brief by *Ryan & Merton;* for the other appellants there was a brief by *T. W. Haight;* and the cause was argued orally by *Mr. Haight* and *Mr. T. E. Ryan.*

For the respondents there was a brief signed by *Chas. Quarles*, of counsel, and *Quarles, Spence & Quarles* and *D. S. Tullar*, attorneys, and oral argument by *Mr. Tullar* and *Mr. Chas. Quarles.*

PINNEY, J. It clearly appears that H. A. Youmans, the lessor of the defendant *Howitt*, and ancestor through whom the other defendants derived their rights to the mill power and water rights and privileges in question, acquired a right by prescription, or an easement, to maintain the waters of

Lake Beulah at the level to which they were finally raised, and at which they had been maintained for a period of over forty years, and consequently to set the waters of the lake back against and over and upon the lands of the riparian proprietors, the plaintiffs and others, on the lake, for the purpose of creating and maintaining the necessary power for propelling a grist mill. His mill site, dam, and appurtenances constituted the dominant estate, and the right which he acquired was an easement in the one estate, and a servitude upon the estates of other riparian owners. Washb. Easements, 5. It seems to be a fair inference that such riparian owners, in view of the advantages that might or would accrue to them by raising the level of the waters of the lake by the dam in question, were induced to consent or acquiesce therein, and in the user of the dam and waters of the lake by Youmans and his predecessor in interest until their acts had ripened into an easement by prescription. The relative relations and interests of the parties which have thus originated, grown up, and become fixed by prescription, would seem to impose upon the parties reciprocal rights and duties, at least to the extent that, so long as such relative rights exist and are asserted, each party is bound in equity to abstain from doing anything to the prejudice of the other's rights, founded upon the relations thus created between them, and that they are equitably bound to deal fairly, reasonably, and justly with each other in respect thereto.

It has long been settled that the artificial state or condition of *flowing* water, founded upon prescription, becomes a substitute for the natural condition previously existing, and from which a right arises on the part of those interested to have the new condition maintained. The watercourse, though artificial, may have originated under such circumstances as to give rise to all the rights that riparian proprietors have in a natural and permanent stream, or have been so long used as to become a natural watercourse prescriptively; and

"when a riparian owner has diverted the water into an artificial channel, and continued such change for more than twenty years, he cannot restore it to its natural channel, to the injury of other proprietors along such channel, who have erected works or cultivated their lands with reference to the changed condition of the stream, or to the injury of those upon the artificial watercourse who have acquired by long user the right to enjoy the water there flowing." Gould, Waters, § 225, and cases there cited. It is upon this ground that when the natural outlet of Lake Beulah was closed, and so remained for over twenty years, the artificial outlet at that time opened, and since maintained during that period, became the natural outlet, with all its legal incidents and consequences. In *Belknap v. Trimble*, 3 Paige, 577, 605, it was held "that the rule must be reciprocal; that the proprietor of land at the head of a stream, who changes the natural flow of water, and has continued such change for twenty years, cannot afterwards be permitted to restore the flow of water to its natural state, when it will have the effect to destroy the mills of other proprietors, which have been erected in reference to such change in the natural flow of the stream." Washb. Easements, *313–315. In *Mathewson v. Hoffman*, 77 Mich. 421, 434, the rule thus stated in *Belknap v. Trimble*, *supra*, was approved. *Lampman v. Milks*, 21 N. Y. 505; *Roberts v. Roberts*, 55 N. Y. 275. It is also supported by *Delaney v. Boston*, 2 Har. (Del.), 489–491; *Middleton v. Gregorie*, 2 Rich. Law, 631–637. In Washb. Easements, *313–315, the learned author lays it down that "where one who owns a watercourse in which another is interested, or by the use of which another is affected, does, or suffers acts to be done, affecting the rights of other proprietors, whereby a state of things is created which he cannot change without materially injuring another who has been led to act by what he himself had done or permitted, the courts often apply the doctrine of estoppel; and equity,

and sometimes law, will interpose to prevent his causing such change to be made." In *Woodbury v. Short*, 17 Vt. 387, it was held that, where a diversion of the stream affects other proprietors favorably, and the party on whose land the diversion is made acquiesces in the stream running in the new channel for so long a time that new rights may be presumed to have accrued, or have accrued, in faith of the new state of the stream, the party is bound by said acquiescence, and cannot return the stream to the former channel. *Ford v. Whitlock*, 27 Vt. 265; *Norton v. Volentine*, 14 Vt. 246.

These cases relate, it is true, to diversions of water in *running* streams, but we are unable to perceive any reason why the same principle is not equally applicable to changes made in the level of a lake or pond, where, by means of a dam, the natural level has been raised for hydraulic purposes. The maintenance of the higher level of waters in the lake for the period of prescription secured to the owners of the mill site an easement in their favor to keep up the water to the necessary level to furnish water power for their mill. So, on the other hand, the riparian owners above have enjoyed, without question or interruption, for the same period of time, the advantages resulting from the flooding and submersion of their lands, by which the depth of water in the lake was greatly increased, and low, boggy, swampy, and unsightly lands were flooded, so that the waters extended to the high banks, whereby their access to and from the lake was improved, and the adjacent lands, with the resulting amenities and advantages, have been rendered extremely desirable for the particular use for which they have been improved at great cost and expense, namely, for summer resorts, relying upon the continued level of the water in the lake without change, without which they would be deprived of the greater portion of their present value. May it not be justly said that the respective tenements or estates, by the acts of their respective owners, have become each dominant, and each

servient to the other in respect to the respective easements and advantages thus acquired by them, and enjoyed during the usual prescriptive period?

In the case of *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co.* 79 Wis. 297, this court held that one who owns land on the shores of an inland lake, which is valuable for use as a pleasure resort on account of its proximity thereto and the easy access to its waters for boating and fishing, can maintain an action to restrain other riparian proprietors from so drawing off the waters of the lake as to lower its level, and leave a wide margin of bog, covered with decaying vegetation along its shores, making it repulsive in appearance and unhealthy in effect, and thus injurious to the plaintiff's property; and this was so held in view of the relative rights and duties of the riparian proprietors, and not because of the restrictive grant of power to the corporation, one of the defendants. It is true that this was held in relation to an attempted change in the *natural* level of Cedar lake, but the conclusion seems irresistible that the increased level of the lake, in view of the facts found, by parity of reasoning from the adjudged cases referred to in relation to streams, must be esteemed as having the legal incidents of the natural level; certainly so long as the defendants *retain and insist upon their easement* to keep and maintain the dam at a height to keep up such new level in the lake. They have not and do not propose to abandon or surrender this easement. They are certainly bound to exercise their rights in a fair and reasonable manner, and as they had been accustomed to do, and not capriciously or wantonly, so as to prejudice the existing rights and interests of the plaintiffs as riparian owners. The judgment of the circuit court is in accordance, we think, with sound principles, and the doctrines recognized and enforced in such and similar cases in courts of equity.

We have no doubt but that the defendants may abandon their water rights and easement, so as to escape all liability

at law for consequent damages, if they are not bound by law or agreement to maintain the higher level of the waters in the lake. It was held in *Mason v. S. & H. R. Co.* L. R. 6 Q. B. 578, that the owners of the servient estate could acquire, by the *mere* existence of the easement, no right, as against the owner of the dominant tenement, to the continuance of its use and exercise, as in the case of an easement for diversion of water; that he had the right to abandon the exercise and use of his easement, as it was not compulsory. But here, as stated, there has been no abandonment or surrender, and the case must be determined upon the *equitable* grounds arising out of the special facts found by the trial court.

2. As to the defendant *Howitt*, it is necessary only to observe that he stands, in respect to his lease, in the same plight and condition of his lessor, and with no other or greater rights. He has no right, under the lease, to use the dam, bulkhead, etc., as a reservoir to accumulate water in a manner not permissible to his lessor, or to accumulate and hold water for his mill on the stream below, in order to discharge it irregularly and in great volumes, as may suit his convenience, thus drawing down wholly, or in great part, the waters of the lake to the level of the flume. As a riparian owner on Mukwanago creek below, he has no such right, but is entitled only to the accustomed flow of the water as it had been wont to run, without material alteration or diminution, to his mill on the stream below (*Kimberly & Clark Co. v. Hewitt*, 79 Wis. 334), all of which he obtains by the flow of the water over the dam or waste gates.

For these reasons we think that the judgment of the circuit court is correct.

By the Court.— The judgment of the circuit court is affirmed.

PACKARD and another, Respondents, vs. KINZIE AVENUE HEIGHTS COMPANY, imp., Appellant.

April 7 — April 30, 1897.

(1) *Appeal: Irregular judgment: Delay in moving to vacate: Waiver.* (2) *Foreclosure of mortgages: Judgment for deficiency before due.*

1. On an appeal from an irregular judgment, taken within the time provided by law, delay in moving to set the judgment aside cannot be held to constitute a waiver of the irregularity.
2. In an action to foreclose a mortgage the rendition of a personal judgment for a deficiency before the deficiency became due by the terms of the contract is a material error.

APPEAL from a judgment of the circuit court for Racine county: FRANK M. FISH, Circuit Judge. *Reversed.*

The action is to foreclose a real-estate mortgage. At the time of the rendition of the judgment of foreclosure and sale, a part only of the mortgage debt had become due and payable. The judgment directed the mortgaged premises to be sold, and the proceeds of the sale to be applied to the payment of so much of the mortgage debt as should be due at the time of the sale, and the surplus deposited with the clerk of the court. The judgment further provided that, if the proceeds of the sale were insufficient to pay the amount actually due at the time of the sale, judgment for the amount of such deficiency should be rendered against the appellant and another, named. The entire mortgaged premises were sold under the judgment. The proceeds of the sale were sufficient to pay all of the mortgage debt which had matured at the time of the sale, and more. But, after the application of the proceeds of the sale to the payment of the mortgage debt, there remained a deficiency of upwards of $10,000. But this was none of it due by the terms of the contract, and would not become due until August, 1897. March 2, 1896, the court made an order confirming the re-

port of sale, and gave the plaintiffs a judgment for such deficiency, amounting to upwards of $10,000. From this judgment this appeal is taken. The appellant also moved the trial court to vacate the judgment for deficiency, which it refused to do. From that order the appellant also appeals.

For the appellant there was a brief by *Sawyer & Sawyer*, and oral argument by *H. W. Sawyer*.

For the respondents there was a brief by *Kearney, Phipps & Thompson*, and oral argument by *W. D. Thompson*.

NEWMAN, J. The respondents do not claim that the entry of the judgment for deficiency was authorized, at the time of its entry, either by the terms of the foreclosure judgment or by the statute. R. S. sec. 3162. But it is claimed by them that its entry at that time was a mere irregularity, which does not render the judgment void, but only irregular, and valid until reversed upon appeal; that it is such an irregularity as can be waived by laches; that it was waived by the appellant by its failure to move promptly to set it aside.

It is true that failure to move promptly to take advantage of mere irregularities is often sufficient ground for the refusal of relief against them. But time does not cure or remove the irregularity. It surely cannot, on appeal, be held that the irregularity has been waived by delay, if the appeal from the irregular order or judgment is taken within the time allowed therefor by law. It must be quite immaterial, on appeal, whether a motion has been made to set the judgment aside, or that the court has refused to do so on the ground of laches. So it comes to the question whether the error is of sufficient importance to require a reversal of the judgment on appeal. That it is so is settled, for this court, by *Danforth v. Coleman*, 23 Wis. 528. That case, on its facts, is on all-fours with this case. It was there held

that a personal judgment for a deficiency cannot be rendered before the deficiency becomes due by the terms of the contract, and the judgment was reversed on that ground.

The judgment being out of the way, the order refusing to set it aside becomes quite immaterial. The appeal from that order may well be allowed to fall with the judgment.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for further proceedings according to law.

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WELLS, Respondent, vs. THE WESTERN PAVING & SUPPLY COMPANY, imp., Appellant.

April 8 — April 30, 1897.

Taxation: Restraining collection of illegal special assessment: Payment of general taxes as condition precedent: Pleading: Waiver: Effect of failure to tender amount legally due: Illegal excess, how determined.

1. Where, by a city charter, payment of the general taxes chargeable to any property is made a condition precedent to an action to avoid a special assessment, a failure in that regard must be taken advantage of by demurrer or plea in abatement, or it will be held to have been waived.
2. Where an assessment of benefits for street improvements has been in all respects legally made so as to determine a proper basis upon which to apportion the cost of the improvement properly chargeable to abutting property, and the subsequent proceedings (in this case the inclusion of illegal elements of expense) result in charging such property an excessive amount for any cause, the owner cannot wait till the improvement is completed and his property has received the full benefit thereof, and then screen himself from the entire tax because of the illegal excess.
3. If, in such a case, the excess can be determined by mere computation, or without proof, failure to tender or offer to pay the balance before suit will be fatal to any claim for costs, and failure to plead an offer to pay fatal to the cause of action.

4. If, however, such excess cannot be determined by computation and without proof, the court should determine the same, as near as practicable, to a reasonable certainty, from the evidence produced on the trial, and require the payment of the balance as terms of granting relief against such excess.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

Plaintiff owned sixty feet frontage on Wisconsin street, of lot 7, block 22, in the Seventh ward of the city of Milwaukee, and this action was brought to set aside a special assessment thereon for laying an asphalt pavement in front thereof.

The complaint sets forth, among other things, that the proceedings to charge the property with such special assessment were had in 1894, under ch. 184, Laws of 1874, being the charter of the city of Milwaukee, and the acts amendatory thereof; that the work was done by the defendant the *Western Paving & Supply Company* under contract duly entered into with the city of Milwaukee; that on completion of such contract there was issued to such company a certificate calling for $320.95 as the amount chargeable to plaintiff's property, assessed thereon as and for work done under such paving contract. The allegations of fact relied upon to avoid the special tax and certificate issued therefor are to the effect that the contract price for the work which was charged to the abutting property included keeping the pavement in repair for five years after its completion, setting limestone protecting curbing at the intersection of unpaved streets and alleys and at such other places as might be directed by the city engineer, and the expense of elevating the cross walks for the width of eight feet at the intersection of streets and alleys, and putting gutters along the same; that the specifications filed required such work to be done as a part of the paving improvement; and that by reason of such requirement the charges against plaintiff's

property were greatly increased over and above the amount legally chargeable thereto. The complaint alleges that plaintiff refused to pay the amount called for by the special tax certificate, whereupon such tax was duly extended on the tax roll of the city for the year 1894 against plaintiff's property, and that within the time required by law plaintiff paid all taxes on her property for such year, except such special tax. The relief prayed for was that the said special assessment, and the certificate referred to, be declared void; that the defendant city and its treasurer be restrained from selling plaintiff's property for the payment of said special assessment, or any part thereof; and that she recover of the defendants her costs and disbursements.

To the complaint defendants answered separately, setting up the provisions of the paving contract in regard to keeping the pavement in repair for the period of five years, and alleging that such provision did not increase the bid price for doing the work to exceed five per cent. of the total cost. On the 29th day of June, 1896, plaintiff moved the court for an order striking out such answers as frivolous, and for judgment. Such proceedings were thereafter duly had that such motion was granted, and judgment thereupon entered in accordance with the prayer of the complaint. From such judgment the defendant the *Western Paving & Supply Company* appealed.

For the appellant there were briefs by *Hoyt, Ogden & Olwell*, and oral argument by *F. M. Hoyt.*

For the respondent there was a brief by *Wells, Brigham & Upham* and *W. E. Black*, and oral argument by *Mr. Black.*

MARSHALL, J. The city charter of the city of Milwaukee provides that: "No person shall be permitted to institute any action or proceeding to set aside any assessment or special tax . . . upon any lot or tract of land . . . unless such person shall first pay or tender to the proper party, or

deposit for his use with the treasurer, the amount of all state, county and city taxes that may remain unpaid on such lot or tract, together with the interest and charges thereon." [Laws of 1874, ch. 184, subch. XVIII, sec. 34.] To meet such provision, it is alleged in the complaint 'that the plaintiff, within the time specified in the tax warrant, paid all taxes levied and assessed against his premises for the year 1894, except the amount assessed against such premises for the cost of said asphalt pavement and resetting the old curbing.' It is claimed that such allegation is insufficient; hence that the complaint fails to state a cause of action. It is unnecessary to determine the sufficiency of such allegation, for that does not go to the cause of action, but to the remedy to enforce it. Failure to pay the legal taxes in compliance with the charter was a condition precedent, strictly so called, to be taken advantage of by demurrer or by plea in abatement; otherwise to be treated as waived. Appellant failed to object in the proper manner, hence it is foreclosed on that point. The subject was fully discussed, and the rule applicable stated and applied, in *Lombard v. McMillan*, 95 Wis. 627.

It is not contended but that all the provisions of the charter were complied with up to and inclusive of the assessment of benefits and determination of the basis upon which the cost of the improvement should be apportioned and charged to the abutting property. But it is insisted that no authority existed for including in such cost keeping the streets in repair for a series of years, putting in protection curbing across unpaved streets and alleys, and raising and constructing cross walks, and that the inclusion of such elements rendered the special tax void. This court so held in *Boyd v. Milwaukee*, 92 Wis. 456, and appellant does not seek, as we understand it, to reopen what was there decided. That case came to this court on appeal from an order of the trial court granting an injunction *pendente lite*. The question of whether the property owner should be compelled to pay that part of

the tax which might legally have been assessed against his property as a condition of being relieved from the illegal and unjust excess was not decided. Appellant now contends that respondent should be so required, and that the trial court, instead of determining as a matter of law that the illegal elements in the tax could not be separated from the portion justly and equitably chargeable to the property, or that, if so separable, it was not the duty of the trial court to resort to evidence to make such separation, should have tried the issue of fact tendered on that subject, taken the evidence, determined the facts, and then not granted relief to respondent except upon condition of her paying the just and equitable part of the special tax.

The rule invoked by appellant was early laid down by this court, and has become thoroughly intrenched in the jurisprudence of this state, though perhaps not heretofore clearly extended so as to meet a case like this. It is based on the familiar principle of equity jurisprudence that he who seeks equity must do equity. Following such principle, it is well established that a court of equity will not grant relief to restrain a tax sale, cancel a tax certificate, or restrain the issue of a tax deed thereon, except upon terms that the taxes be first paid to which there are no objections, or which, in justice and equity, the property owner ought to pay. *Hersey v. Milwaukee Co.* 16 Wis. 185; *Bond v. Kenosha*, 17 Wis. 284; *Myrick v. La Crosse*, 17 Wis. 442; *Mills v. Gleason*, 11 Wis. 470. Though, for a time, these adjudications were supposed to have been somewhat discredited, reference being had to *Marsh v. Clark Co.* 42 Wis. 502; *Tierney v. Union Lumbering Co.* 47 Wis. 248; *Plumer v. Marathon Co.* 46 Wis. 163, and some other cases that might be cited, the doctrine of the early cases has since been repeatedly affirmed, and it stands now unassailable in this court. *Fifield v. Marinette Co.* 62 Wis. 532; *Wis. Cent. R. Co. v. Lincoln Co.* 67 Wis. 478; *Canfield v. Bayfield Co.* 74

Wis. 60; *Boorman v. Juneau Co.* 76 Wis. 550; *Green Bay & M. Canal Co. v. Outagamie Co.* 76 Wis. 587; *Kaehler v. Dobberpuhl*, 56 Wis. 480; *Hixon v. Oneida Co.* 82 Wis. 515. It is the settled doctrine of this court that it is not enough to avoid a tax in equity to show that the proceedings were irregular or even void, but, in addition, it must also be shown that the taxes were inequitable (*Hixon v. Oneida Co., supra*); that, where taxes are legal or, whether strictly legal or not, are just and equitable, and are joined with such as are illegal and inequitable, the illegal excess, if it can be separated, is only conditionally voidable in equity, the condition being payment of the balance of the taxes. *Wis. Cent. R. Co. v. Lincoln Co., supra.* Such equitable rule has been crystallized into legislative enactments, several of which followed promptly upon, and may safely be assumed to have been caused by, holdings of this court supposed to constitute a departure from the early rule governing the subject. The court promptly retraced its steps in that regard, gave full effect to such legislative enactments, and carried the spirit of the rule into effect in respect to all questions affecting taxation to which it was applicable, so that, as said by Mr. Justice TAYLOR in *Fifield v. Marinette Co., supra:* "The effect is to compel every taxpayer who comes into a court of equity to void his taxes for any cause to first pay such taxes on his property as he ought in justice to pay." Since the decision in that case, the legislative policy in that regard has been still more pronounced, as shown in *Day v. Pelican*, 94 Wis. 503, construing sec. 1164, S. & B. Ann. Stats., which provides that every person aggrieved by the levy and collection of any unlawful tax assessed against him in any town, city, or village may sue for recovery of all moneys so unlawfully levied and collected of him, "provided, however, that no action shall be maintained under the provisions of this section unless it shall be made to appear to the court that the plaintiff has paid more than his equitable share of such

taxes." This court held that taxes assessed and paid on property not taxable to the complainant could not be recovered if he possessed property of equal or greater value in the taxing district, which should have been, but was not, assessed for taxation.

From the foregoing it is obvious that the legislative policy and the administration of the law in equity is firmly set in the direction of compelling property owners to bear their just and equitable portion of the public burdens. Whether such equitable rule applies to special assessments, and, if so, to what extent, is worthy of some consideration. In *Myrick v. La Crosse*, 17 Wis. 442, the rule was invoked, but not applied. It may be assigned fairly as the reason therefor, that the lot owner was entitled to do the work himself, if he so chose; that the requisite proceedings were not had to give him that privilege before assessing his property for the cost of the improvement; hence that there was no jurisdiction for charging such property at all. In *Hayes v. Douglas Co.* 92 Wis. 429, the rule was not applied, for the obvious reason that the assessment of benefits requisite to jurisdiction to impose any tax on the abutting property for the improvement was not made. In *Watkins v. Zwietusch*, 47 Wis. 513; *Johnson v. Milwaukee*, 40 Wis. 315; *Rork v. Smith*, 55 Wis. 67; *Dean v. Madison*, 9 Wis. 402; *Jenkins v. Rock Co.* 15 Wis. 11; *Liebermann v. Milwaukee*, 89 Wis. 336; and *Saunderson v. Herman*, 95 Wis. 48 — the groundwork of the entire tax was wanting, in that there was a failure to give the lot owner the opportunity to do the work where such opportunity was secured to him by law, or there was a failure to make any assessment of benefits so as to arrive at a legal basis for apportioning the cost of the improvement, or there was some other difficulty going to the groundwork of the entire tax, and showing that it was unjust and inequitable. In *Kneeland v. Milwaukee*, 18 Wis. 411, the provision of the charter requiring filing of the plans and specifications,

which was a condition precedent to any proceedings to contract for the work at the expense of abutting property, was not complied with. In *Wells v. Burnham*, 20 Wis. 112, defective plans and specifications were filed. The court held, on demurrer, that the complaint stated a cause of action, because the failure to file perfect plans and specifications, and to let the contract with reference thereto, at least *prima facie* was prejudicial to the lot owner. Whether, on proof to the contrary, the trial court would have held the defect in equity sufficient to avoid the entire tax, was not decided. The decisions on this line may not be in entire harmony, but the foregoing, and others hereafter referred to, clearly show that in the main they support the rule that, where a proper assessment of benefits has been made, or the groundwork for a proper apportionment of the expense of the improvement has been legally determined, errors causing an excessive apportionment of the cost of such improvement will not defeat the whole tax in equity.

The sole complaint here is that certain elements of expense were improperly included in the cost of the improvement. Determine to what extent such elements enhanced the total cost of such improvement, deduct such excess from the total, and the result will show the amount which plaintiff in justice and equity ought to pay. In *Cook v. Racine*, 49 Wis. 243, the basis for apportioning the tax was properly determined. The contract was let to do the work for forty cents per front foot, when responsible parties offered to do the same for twenty-five cents per front foot. The action was to set aside the whole tax as void for fraud in letting the contract. On the trial it was established by evidence that twenty-five cents per front foot was a reasonable price, and that the municipal officers refused ample opportunity to let the same at that price. This court held, reversing the court below, that collection of the tax should be restrained and the certificate canceled on condition of payment, within such

reasonable time as the trial court might fix for that purpose, of a sum equal to twenty-five cents per front foot, with interest at seven per cent. per annum from the time the lot would have been sold for the tax but for the injunction. In *Mills v. Charleton*, 29 Wis. 400, it was directly held that special taxes levied for local improvements are to be regarded as one of the constitutional methods of taxing the citizen for the benefit of the public, and that any equitable rule which applies to other constitutional methods must, with equal propriety, be applied to it; that a tax lawfully imposed, whether in one mode or another, must be regarded as equally just and equally entitled to favor in a court of equity. Said DIXON, C. J., speaking for the court: "The reassessment here is by legal authority, except so far as it is vitiated by the mistake, which part is clearly distinguishable. The court perceives no reason for refusing to apply the principle to such a case, any more than to any other case of mistake or distinguishable excess in matters of taxation." The same rule was applied in *Meggett v. Eau Claire*, 81 Wis. 326.

The rule under discussion is not confined to cases of mere irregularities, as is sufficiently shown by *Mills v. Charleton*, *supra*, and *Cook v. Racine*, *supra*, but applies to all cases where the taxes are in part just and equitable, whether legal or not, and part illegal, unjust, and inequitable, if the latter can be distinguished from the former. The application of this doctrine, though there are cases indicating a contrary view, in our opinion should not be confined to instances where the illegal excess consists of distinct items or can be determined without evidence by mere computation, but should be extended to all cases where such excess can be judicially determined by evidence to a reasonable certainty, the same as other facts in issue; the burden being on the person seeking to enforce the tax which includes the illegal excess to establish by clear and satisfactory evidence the

amount that is justly and equitably chargeable to the property. *Hebard v. Ashland Co.* 55 Wis. 145. The fact that such amount cannot be determined with exactness and without proof is no justifiable reason for allowing the property owner to escape the payment of the entire tax. If the amount of the tax can be determined by clear and satisfactory evidence, exclusive of the unauthorized and illegal elements,—and no reason is perceived why such cannot be done in this case,—the court, in the exercise of its equitable powers, has ample authority to and should determine the facts in that regard, and apply the proper remedy.

If the foregoing be an extension of the equitable rule, in view of *State ex rel. Roe v. Williston*, 20 Wis. 228, and other cases that might be cited, such extension is required to effectually give force to the manifest policy of the legislative department of the state, which it is the duty of the court to do within constitutional limits. It is in the direction of the ever-growing adaptation of equitable principles to the more perfect administration of justice, and is yet short of the advanced ground occupied by courts of the highest respectability elsewhere, as will be seen from a few examples. In *State Railroad Tax Cases*, 92 U. S. 575, there was no question but that the taxes were void for want of a legal assessment of the railway property. The very groundwork of the tax was wanting. The railroad companies sought to avoid all their taxes, notwithstanding it stood admitted that they had a large amount of real and personal property subject to taxation. Mr. Justice MILLER, speaking for the court, said, in effect, that evidently the property should be taxed by some rule; that it could not be said the whole tax is void in equity because a wrong rule had been adopted whereby an excessive amount was imposed; that the property holder in such a case cannot escape, and pay nothing, because the amount assessed is too much; that before he can be relieved of the excess tax he must pay what ought to be paid, so far as it can be as-

certained; that the observance of this principle will be just, and will prevent the largest part of tax litigation that comes to the federal courts; and that, with unanimity, such principle is established by the supreme court of the United States for the guidance of all the federal courts in such cases. To the same effect are *National Bank v. Kimball*, 103 U. S. 732; *German Nat. Bank v. Kimball*, 12 Fed. Rep. 96; *Pelton v. Nat. Bank*, 101 U. S. 143; *Cummings v. Nat. Bank*, 101 U. S. 153; *Williams v. Weaver*, 100 U. S. 547,— and many other cases that might be cited in the federal supreme and other courts. The proper deduction therefrom may be stated tersely in the words of the text in Desty, Taxation, 658, as follows: "It should be shown as near as possible what part is just and what part unjust, and that which is just should be paid as a condition of obtaining the relief sought." In *Trustees of C. S. Railway v. Guenther*, 19 Fed. Rep. 395, the plaintiff's property had been purposely overvalued for the purpose of making it pay more than its just proportion of the tax. It was held that it could not obtain relief in equity without its being first determined how much tax should be assessed upon the property when valued on the basis adopted for the valuation of other property, and the payment of such tax. Further citations along this line could be made, but sufficient authority has been referred to to show the extent to which the rule under consideration is applied in the highest courts in this country.

From the foregoing we deduce the following conclusion: When, as in this case, the statutory requisites to the assessment of a tax for a street improvement upon abutting property are all complied with up to the time of filing the estimates or specifications for letting the work,— that is, when the assessment of benefits has been in all respects legally made, so as to determine a proper basis upon which to apportion the cost of the improvement properly chargeable to abutting property,— and the subsequent proceedings result

in charging such property an excessive amount for any cause, the owner cannot wait till the improvement is completed and his property has received the full benefit thereof, and then screen himself from the entire tax because of the illegal excess. If such excess can be determined by mere computation, or without proof, failure to tender or offer to pay the balance before suit will be fatal to any claim for costs, and failure to plead an offer to pay fatal to the cause of action; but if such excess cannot be determined by computation and without proof, the court should determine the same, as near as practicable, to a reasonable certainty, from the evidence produced on the trial, and require the payment of the balance as terms of granting relief against such excess.

The foregoing requires that the judgment be reversed and the cause remanded for further proceedings in accordance with this opinion.

By the Court.— So ordered.

LEVY, Respondent, vs. WILCOX, imp., Appellant.

April 8 — April 30, 1897.

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Tax certificates: Special assessments: Limitations: Joinder of legal and illegal items: Commencement of action.

1. Sec. 1210*h*, S. & B. Ann. Stats. (limiting to one year from the date of the sale the time within which proceedings must be commenced to set aside any sale of lands for the nonpayment of taxes, or to cancel any tax certificate, or to restrain the issuing of any tax certificate or tax deed, for any error or defect going to the validity of the assessment and affecting the groundwork of the tax), applies to sales for street-improvement assessments and certificates issued thereon.
2. The joinder of taxes, void for defects going to the validity of the assessment and affecting the groundwork thereof, with other

taxes which a court of equity will require paid as terms of granting relief against the illegal taxes, will not prevent the running of the statute of limitations as to such illegal tax.

3. An action to set aside an illegal special assessment for street improvements cannot be deemed commenced against the owner of the certificate of the board of public works therefor, to whom it had been transferred by the contractor, so as to stop the running of the statute of limitations as to the former, until the summons is actually served upon him, although it had been commenced against the city and the contractor before the expiration of the period of limitation.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

This was an action to set aside a tax-sale certificate issued on a sale of plaintiff's property described in the complaint for delinquent special paving assessments thereon, and to avoid all the proceedings upon which such tax sale was based. Substantially the same facts were alleged in the complaint as in *Wells v. Western Paving & Supply Co.*, *ante*, p. 116, to which case, in respect to such facts, reference is made. In addition it was alleged, in substance, that such proceedings were had that on the 19th day of February, 1895, the city treasurer of the city of Milwaukee, under the authority vested in him for that purpose, sold plaintiff's property for the special tax thereon; that defendant *George G. Wilcox* was the owner and holder of the paving certificate to satisfy which such tax sale was made; and that, unless restrained by the court, the proper tax-sale certificate would be issued on such sale, and delivered.

Defendant *Wilcox* answered to the effect that the tax sale was made February 19, 1895; that the action to void the same and cancel the tax-sale certificate issued thereon was not commenced against the owner of such tax-sale certificate or such paving certificate till June 23, 1896; that the grounds for relief against such tax and such tax sale, alleged in the complaint, were errors or defects going to the validity of the

assessment and affecting the groundwork of the tax; that the action was not commenced within one year from the date of such tax sale, and that defendant would rely and insist upon the statute of limitations (sec. 1210*h*, S. & B. Ann. Stats.) as a bar against the maintenance of the action.

A motion was made on behalf of plaintiff to strike out the answer, and the answer of the city as well, and for judgment, upon the ground of the frivolousness of such answers. Such motion was granted, and judgment thereupon entered for the relief prayed for in the complaint, from which judgment defendant *Wilcox* appealed.

For the appellant there was a brief by *Quarles, Spence & Quarles*, and oral argument by *Charles Quarles*.

For the respondent there was a brief by *Howard & Mallory*, and oral argument by *Samuel Howard* and *R. B. Mallory*. They contended, *inter alia*, that the plaintiff's lot was sold to the city of Milwaukee for the nonpayment of this tax, and immediately thereafter suit was commenced against the said city and the Western Paving & Supply Company to contest the validity of the tax. The Western Paving & Supply Company for more than a year defended this action, both on its own behalf and on that of the city, and it was only after the supreme court had declared this assessment absolutely illegal and without authority of law that the paving company came in and answered that long prior to the commencement of the action it had sold and transferred the certificate of the board of public works to a third party, and that it had no interest in the action. If it should be held that the defendant *Wilcox* should have been made a party within the year under sec. 1210*h*, S. & B. Ann. Stats., it would open the way to collusion between the contractor and a third party, and a property owner would be obliged to pay an assessment no matter how illegal it might be. The defendant *Wilcox* is a nonresident of this state. Sec. 4231, R. S., provides that if, when the cause of action shall accrue

against any person, he shall be out of this state, such action may be commenced within the terms limited after such person shall return to or remove to this state. In a similar case in New York, where the language of the statute is identical, it was held applicable to cases of special limitation. *Hayden v. Pierce*, 144 N. Y. 512.

MARSHALL, J. By sec. 1210*h*, S. & B. Ann. Stats., pleaded and insisted upon by appellant, it is provided that "every action or proceeding to set aside any sale of lands for the nonpayment of taxes, or to cancel any tax certificate, or to restrain the issuing of any tax certificate or tax deed, for any error or defect going to the validity of the assessment, and affecting the groundwork of such tax, shall be commenced within one year from the date of such tax sale, and not thereafter." Such statute applies to tax sales, and certificates issued thereon, for street improvements. *Dalrymple v. Milwaukee*, 53 Wis. 178; *Pratt v. Milwaukee*, 93 Wis. 658. And thereby all questions covered by such statute, respecting the tax certificate in question, are at an end; the period therein named having expired before the commencement of this action, and the statute having been properly pleaded. *Pratt v. Milwaukee, supra; Knox v. Cleveland*, 13 Wis. 245.

We are at a loss to comprehend why the trial court granted the motion to strike out the answer setting up the statute of limitations, in view of the decisions of this court heretofore rendered, covering, apparently in an unmistakable manner, every question involved. The word "assessment," as used in the statute, does not mean merely the valuation of the property for taxation, or, in a case like this, the assessment of benefits as a basis for apportioning the cost of an improvement. It includes the whole statutory mode of imposing the tax complained of. *Prentice v. Ashland Co.* 56 Wis. 345. If the defects alleged pertain to any step or steps which re-

sulted in the imposition of the tax on respondent's property, and which affect the groundwork of such tax, then the statute under consideration operates to fix a period beyond which an action to avoid the tax for such defects cannot be commenced.

The trial judge, following *Boyd v. Milwaukee*, 92 Wis. 456, held that a tax for keeping the pavement in repair was unauthorized and void for want of power to levy it. Such want of power obviously goes to the groundwork of the tax. The learned circuit judge further evidently concluded that a court of equity could not separate the cost of the improvement that might properly have been imposed on the property from the illegal portion; hence, that the defect went to the groundwork of the entire tax. Having reached such conclusion, no reason is perceived for striking out the answer, which clearly entitled the appellant to the benefit of the statute of limitations.

We have just held in *Wells v. Western Paving & Supply Co.*, *ante*, p. 116, to the effect that where illegal are joined with legal taxes, so that the same cannot be separated by mere computation, the property owner who challenges the whole tax cannot, in a court of equity, put forth the illegal element as a shield to protect himself from the entire tax, but that the court should hear the evidence, if any be offered, and determine therefrom what part of the cost is justly and equitably chargeable to the abutting property, and require its payment as terms of granting relief against the balance. Such being the proper rule, we must hold that the joining of taxes void for defects going to the validity of the assessment and affecting the groundwork thereof, with other taxes, which a court of equity will require paid as terms of granting relief against the illegal tax, will not prevent the running of the statute of limitations as to such illegal tax. The property owner cannot escape the bar of the statute as to the illegal portion because it is united with that portion which in justice and equity he ought to pay.

In the foregoing, we treat the case as not commenced against the appellant, who was the owner of the certificate, till he was brought in by amendment, June 23, 1896, after the expiration of the year limited by statute therefor, though it was commenced against the city of Milwaukee, and others having no beneficial interest in the certificate, before the bar of the statute was complete. Time continued to run in favor of the real party in interest, the appellant, till he was made a party to the action by amendment, June 23, 1896. This is elementary, and needs no citation of authorities in support of it. But, aside from the elementary principle above stated, secs. 4239, 4240, R. S., provide that no action shall be deemed commenced against any defendant, within the meaning of any provision of law which limits the time for the commencement of an action, until the summons is served on him, or service is attempted, in cases where service may be made by publication, and such attempt is followed by actual service by publication, within sixty days, except in case of defendants united in interest with a co-defendant served with process before the running of the period of limitation. So, under the plain provisions of our statutes, this action was not commenced against the appellant till he was made a party thereto.

It follows from the foregoing that the trial court should have denied the motion to strike out the answer of the appellant. The motion, in effect, admitted the facts pleaded, and all such facts appear by the record as true, leaving nothing to be established by evidence; hence this court will dispose of the matter as indicated in the mandate.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to render judgment sustaining the plea of the statute of limitations, and for costs in favor of the appellant.

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FRECKMANN, Respondent, vs. SUPREME COUNCIL OF THE ROYAL ARCANUM, Appellant.

April 7 — April 30, 1897.

Mutual benefit societies: Failure to pay assessment: Suspension of member ipso facto.

Under a by-law of a mutual benefit society providing that any member failing to pay an assessment within thirty days after notice thereof "shall stand suspended from the order and all benefits therefrom," a failure to pay within such time operates *ipso facto* to suspend the delinquent without any action on the part of the society.

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Reversed.*

On the 11th of August, 1892, John Henry Freckmann joined a subordinate council of the Royal Arcanum, and received a benefit certificate for the sum of $1,500, payable in case of his death to his wife (plaintiff here), provided "that said member is in good standing in this order at the time of his death." One of the by-laws of the defendant, which became a part of the contract, is as follows:

"Sec. 473. Each member shall pay the amount due on the notice of the collector within thirty days from the date of such notice, and any member failing to pay such assessment within said thirty days *shall stand suspended from the order and all benefits therefrom.*"

On the 1st of November, 1893, an assessment was levied on the members of the order, and due notice was given to Freckmann to pay it. He did not pay it at any time. Freckmann became treasurer of his council in February, 1893, and in November, 1893, was tried before a committee of the council upon charge of defalcation, and on the 28th of said month was found guilty, and expelled from the order. On the 8th day of December, 1893, Freckmann died. A verdict for the plaintiff for the full amount of the benefit certificate

and interest was directed, and from judgment thereon the defendant appealed.

Elihu Colman, for the appellant.

M. N. Lando, for the respondent.

WINSLOW, J. It is claimed that the trial and expulsion of Freckmann were irregular, and hence void. We need not consider this question, because upon another ground it is plain that the plaintiff cannot recover. The certificate was only payable in case Freckmann was a member of the order in good standing at the time of his death. The by-law which provided for suspension from the order in case of nonpayment of an assessment was plainly self-executing. In case an assessment is not paid within thirty days from the date of the notice, the member "*stands suspended*" from the order. No action by the council was necessary; the suspension was complete at the expiration of the thirty days. Niblack, Ben. Soc. & Acc. Ins. (2d ed.), § 289; *Lyon v. Royal Society of Good Fellows*, 153 Mass. 83. Hence Freckmann was not a member in good standing at the time of his death.

By the Court.—Judgment reversed, and action remanded for a new trial.

CASSODAY, C. J., took no part.

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HELLER, Respondent, vs. THE CITY OF MILWAUKEE, Appellant.

April 7—April 30, 1897.

Special assessments: Milwaukee city charter: Liability of city to refund money paid for void certificates of sale: Construction of statutes.

1. Under the charter of the city of Milwaukee (sec. 21, subch. V, ch. 184, Laws of 1874), providing that persons entering into contracts with the city who agree to be paid from special assessments shall have

no claim upon the city in any event except from the collection of the special assessments made for the work contracted for, no action will lie against the city to recover the amount paid for a void certificate of the sale of land for the nonpayment of such an assessment.

2. The purchaser of a void certificate of the sale of land by a city for the nonpayment of assessments for local improvements is not entitled to have his money refunded by virtue of sec. 1184, R. S. (providing for the refunding of money paid for invalid tax certificates), that section being applicable only to lands sold for the nonpayment of general taxes; nor is such right secured by sec. 4966, making the Revised Statutes apply to cities whenever applicable and not inconsistent with their charter, nor by sec. 1186, S. & B. Ann. Stats., providing for reassessment for money refunded on illegal tax deeds.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

For the appellant there was a brief by *C. H. Hamilton*, city attorney, and *Ernest Bruncken*, assistant city attorney, and oral argument by *Mr. Bruncken*. They contended, *inter alia*, that the rule "*caveat emptor*" applies to the purchase of a tax certificate at a tax sale. The selling power does not warrant the validity of the title conferred by the sale. The purchaser merely volunteers to pay the tax, expecting to profit by the high rate of interest the law allows him to exact from the owner of the land upon redemption. The things on which the validity of the tax and consequently the value of the certificate depend are matters of record, which the purchaser has as good opportunity to know as the selling officer himself. There is no injustice in requiring a purchaser to search the records if he would be sure he is getting his money's worth. *Harlan v. Jones*, 104 Ind. 167; *Emerson v. Washington Co.* 9 Me. 88; *Lynde v. Melrose*, 10 Allen, 49; *Indianapolis v. Langsdale*, 29 Ind. 486; *Loomis v. Los Angeles Co.* 59 Cal. 456; *Wilmerton v. Phillips*, 103 Ill. 78; Cooley, Taxation, 475; 2 Blackwell, Tax Titles, § 1007; *American Inv. Co. v. Beadle Co.* 5 S. Dak. 410, and cases cited.

Frank B. Van Valkenburgh, for the respondent, to the point that the payment was made under a mistake of fact which entitled the purchaser to recover back his money, cited *Hurd v. Hall*, 12 Wis. 125; *Lawton v. Howe*, 14 id. 241; *Paul v. Kenosha*, 22 id. 266; *N. W. U. P. Co. v. Shaw*, 37 id. 655; *Stocks v. Sheboygan*, 42 id. 315; *Birkhauser v. Schmitt*, 45 id. 316; *Jackson v. Jacksonport*, 56 id. 310; *Marsh v. St. Croix Co.* 42 id. 373; *Wells v. Am. Exp. Co.* 49 id. 224; *Wiesmann v. Brighton*, 83 id. 550; *Fay v. Lovejoy*, 20 id. 407.

CASSODAY, C. J. This is an appeal from an order overruling the demurrer to the complaint, alleging, in effect, that the defendant sold certain real estate described, February 2, 1892, in the city of *Milwaukee*, to the plaintiff, for the alleged nonpayment of city taxes, assessments, and charges on two certain lots described, and thereupon the defendant issued to him the usual certificate or contract reciting such sale to the plaintiff for the sum named; that the certificate bears interest at the rate of twenty-five per cent. per annum; that, if the land so sold should not be redeemed according to law, the owner of the certificate would be entitled to a conveyance of so much of said land as should remain unredeemed; that the defendant had not taken such proceedings and steps as authorized and empowered it to sell such lands at the date named; that, accordingly, one Liebermann, who was the owner and in possession of said lots, brought suit against the defendant and this plaintiff to have such sale and sale certificate declared to be null and void, and such proceedings were had and taken in that action that said sale and said certificate were adjudged and declared absolutely null and void, and of no value whatever, for the reason that the city officials and the city neglected to take proper steps to make the same valid (*Liebermann v. Milwaukee*, 89 Wis. 336); that the plaintiff paid the defendant the sum of $570.16 upon said pretended sale, as stated, and had received no consideration

therefor; except said void tax-sale certificate; that he is now still the owner and in possession of said certificate; that no part thereof had been redeemed; that the time for redeeming the same and taking the deed had long since passed; that he hereby and herewith brings said certificate into court, and offers to deliver the same for cancellation; that the defendant had refused, and still does refuse, to repay the same to the plaintiff, to his damage of $1,000; wherefore he demands judgment for $570.16, together with interest thereon from February 2, 1892, with costs.

The plaintiff contends that, the sale and certificate upon which he paid the money mentioned having been adjudged void, he is entitled to have the money so paid by him refunded, with interest, by virtue of the provisions of sec. 1184, R. S. But that section relates only to lands sold for the nonpayment of general taxes, and has no reference to the sale of lands for nonpayment of assessments for local improvements. Such contention is not aided by the statute which declares that "all the laws contained in these revised statutes shall apply to and be in force in each and every city and village in the state so far as the same are applicable, and not inconsistent with the charter of any such city or village; but when the provisions of any such charters are at variance with the provisions of these revised statutes, the provisions of such charters shall prevail, unless a different intention be plainly manifested." R. S. sec. 4986. Nor is it aided by the statute providing for the reassessment for money refunded on illegal tax deeds. S. & B. Ann. Stats. sec. 1186. The charter of *Milwaukee* provides that "any person entering into any contract with the city, and who agrees to be paid from special assessments, shall have no claim upon the city in any event, except from the collection of the special assessments made for the work contracted for; and no work proper to be paid for by special assessments shall be let, except to a contractor who shall so agree." Laws of 1874,

ch. 184, subch. V, sec. 21. Under that charter, this court has held that "where a lot is sold by the city treasurer of *Milwaukee* for the amount of certificates of the board of public works, and is bid in by the city, the certificate of such sale issued to the city will be held by it in trust for the several owners of the certificates of the board of public works." *Hoyt v. Fass*, 64 Wis. 273. So, "where work of the kind above described was ordered and contracted to be done at the expense of adjoining lots, without taking the necessary steps to charge the lots, *held*, that the contractor cannot recover from the city, under a charter which declares that 'in no event, when work is ordered to be done at the expense of any lot, shall the city be held responsible on account thereof.'" *Hall v. Chippewa Falls*, 47 Wis. 267. To the same effect, *Owens v. Milwaukee*, 47 Wis. 470, 471. The authorities cited rule this case. We must hold that the complaint states no cause of action against the city.

By the Court.—The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

McGeoch and another, Executors, Appellants, vs. Carlson, Respondent.

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April 7 — April 30, 1897.

Evidence: Appeal from justice's court: Justice's minutes: Refreshing recollection.

1. On the trial of an appeal from a judgment rendered by a justice of the peace, the justice's minutes of the testimony of the plaintiff, since deceased, as a witness are not competent to prove such testimony, but the justice is a competent witness for that purpose, and may refer to such minutes to refresh his recollection.
2. In such a case the exact words of the deceased need not be given in order to render evidence of his testimony admissible.

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Reversed.*

This was an action, brought by Peter McGeoch against the defendant in justice's court, for the conversion of a horse, the property of said McGeoch, alleged to have been stolen from him, and that it afterwards came to the defendant's possession, who held the same, and claimed it as his own property, and, upon demand therefor, refused to give it up. The defendant answered by a general denial, and alleged that he purchased and paid for the horse at a reasonable price, and that he had the title to it. The plaintiff had judgment, and the defendant appealed to the superior court. Plaintiff having died, the action was, on suggestion, continued in the name of the present plaintiffs, as his executors.

At the trial in the superior court, the plaintiffs called as a witness the justice of the peace before whom the action was tried, and who had taken down the evidence at the trial, and offered to prove by him what the plaintiffs' testator testified to, as a witness in his own behalf, on such trial, in reference to the horse, the defendant being represented by counsel at such trial. The witness testified that he might not have taken down every word that was said by McGeoch, but took down all of the material statements that he made, both on direct and cross-examination, and that he had the minutes with him. The plaintiffs' counsel offered the minutes in evidence, but, upon objection, they were excluded. The witness was asked these questions, namely: What did McGeoch at that time testify as to who was the owner of the horse? What did he then testify to as to who had possession of the horse? What did he then testify to as to whether that horse was stolen from him, and when? Each of these questions was objected to on the ground that it was incompetent and immaterial, and in each instance the objections were sustained. The plaintiff offered to prove by the said justice that on the former trial he was present and heard and took down

the evidence of McGeoch, and what McGeoch testified to in reference to who was the owner of the horse, and when it went out of his possession, and how and when he last saw it, and that the justice made a memorandum of that evidence at the time; but the evidence was objected to, and the court excluded it, for the same reasons. The plaintiffs examined one witness as to the ownership of the horse, and another as to its value, and rested. The defendant's counsel moved for a nonsuit, which was granted, and judgment was given for the defendant accordingly, from which the plaintiffs appealed.

For the appellants there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *L. A. Olwell.*

For the respondent the cause was submitted on the brief of *Orren T. Williams.*

PINNEY, J. While the minutes kept by the justice of the testimony of McGeoch, since deceased, were not admissible as competent evidence to prove what he testified to as a witness on the former trial, the justice, however, was a competent witness for that purpose, and he might use or refer to the minutes of such testimony taken by himself to refresh his recollection. The issue and the interest of the respective parties are the same as on the first trial; the present plaintiffs, as executors, standing in the place of and holding the interest of McGeoch, the deceased plaintiff. It is enough if the second trial is between those who represented the parties at the first trial by privity, in blood, in law, or in estate. The defendant was represented on the former trial by counsel, who had an opportunity of cross-examining the witness. The evidence tendered was clearly competent. It is not necessary that the exact words of the deceased be given. It is enough if the substance of his testimony can be stated. Jones, EV. §§ 339, 346; *Charlesworth v. Tinker*, 18 Wis. 633; *Zitske v. Goldberg*, 38 Wis. 216, 228.

It is urged that there was no evidence of conversion. Both parties claim title to the horse, each denying the right of the other, as appears from the pleadings; and it may well be that the evidence of what McGeoch testified to on the former trial, tendered and rejected, if admitted, would have supplied any want or defect of evidence of conversion. For these reasons there must be a new trial.

By the Court.—The judgment of the superior court is reversed, and the cause is remanded for a new trial.

SCHIFFLER, by guardian *ad litem*, Appellant, vs. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

April 8—April 30, 1897.

Railroads: Injuries to minor jumping from moving train: Duty to stop at station not scheduled: Conductor's powers: Assumption of risk: Proximate cause.

1. It is the duty of a passenger to ascertain, before boarding a train, whether it stops at his destination, and his failure in that regard imposes no duty upon the company to stop at such station contrary to the published schedule.
2. It is not within the apparent power of the conductor of a passenger train to bind the railroad company by any promise to change the published schedule of the train.
3. A boy of ordinary intelligence, seventeen years old, who had on several occasions made journeys by railroad alone, is *held* to have assumed the risk in jumping from a moving train at a station at which the train was not scheduled to stop, although the conductor had accepted his fare to that station and promised to slow up for him, and the boy thought the promise was being kept and jumped when the train did not appear to be slowing up any more.
4. The failure to stop the train in such a case was not the proximate cause of injuries received by reason of the jump.

APPEAL from an order of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Affirmed.*

Action for personal injury. The complaint alleges that the plaintiff is an infant under the age of twenty-one years,—at the time of the injuries complained of, of the age of seventeen years; that plaintiff entered one of defendant's passenger trains at the city of Milwaukee for the purpose of taking passage thereon to the station of Jackson, in this state; that he failed to get a ticket before entering upon the train, because he was late at the train; that after the train was in motion the conductor of the train informed the plaintiff that that train did not stop at Jackson, but received his proper fare, and promised that the train would slacken its speed, without coming to a full stop, so that the plaintiff might alight therefrom at Jackson, and took and kept the fare as aforesaid of the plaintiff from Milwaukee to Jackson; "that the plaintiff had several times before August 17, 1895, paid a like fare and obtained carriage as a passenger from Milwaukee to said Jackson, and in each of said cases the train of the defendant was properly stopped at Jackson long enough for the plaintiff to alight therefrom;" that the plaintiff was "young and inexperienced, and without knowledge of such danger or appreciation of such risk" as was consequent upon an attempt to alight from a moving train; that "the plaintiff, in obedience to such suggestion of the conductor, went upon the platform of one of the coaches, and prepared to alight therefrom as soon as said train slackened its speed for that purpose, and that about the time of reaching the platform of said station at Jackson said train began to slacken its speed, and the plaintiff waited upon said platform until the train had traveled quite a distance past said station, and, believing that the speed of said train was sufficiently slackened to permit the plaintiff to alight in safety, relying on the statement of the conductor as aforesaid, the plaintiff attempted to alight from said moving train," and was injured in the manner specifically alleged in the complaint; that the conductor "carelessly and negli-

gently neglected to stop said train long enough to permit the said plaintiff to alight therefrom at Jackson, . . . and carelessly and negligently caused said train to be run by and past the said station called Jackson, and by and past the point where the plaintiff was to alight therefrom as aforesaid, at such a rapid rate of speed that injury was reasonably certain to result therefrom to any one attempting to alight from said moving train."

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. From an order sustaining the demurrer, the plaintiff brings this appeal.

For the appellant there was a brief signed by *Timlin & Glicksman* and *E. A. Conway*, counsel, and oral argument by *W. H. Timlin*. They contended, *inter alia*, that the defendant through its servants received the plaintiff as a passenger and kept the fare offered by him for his passage. Having done this a duty arose on the part of the defendant to properly and safely carry plaintiff and to set him down at the place of destination in safety, for a carrier of passengers is required to exercise the utmost care "which can be exercised under all the circumstances, short of a warranty of the safety of passengers." *Delamatyr v. M. & P. du C. R. Co.* 24 Wis. 578; *Curtis v. D. & M. R. Co.* 27 id. 158; *Hartwig v. C. & N. W. R. Co.* 49 id. 358; *Ft. Worth & D. C. R. Co. v. Kennedy*, 12 Tex. Civ. App. 654. The negligence of the conductor in failing to provide for the safety of the plaintiff was the negligence of the defendant, for the whole power of the corporation *pro hac vice* is vested in him, and as to passengers of the train he is to be considered as the corporation itself. *Craker v. C. & N. W. R. Co.* 36 Wis. 657; *Bass v. C. & N. W. R. Co.* id. 450, 463; *Great Western R. Co. v. Miller*, 19 Mich. 305; *Rauch v. Lloyd*, 31 Pa. St. 358. Whether plaintiff, when informed by the conductor that the train would not stop at his destination, was

guilty of contributory negligence in leaping off while it was in motion, was a question for the jury. *Missouri, K. & T. R. Co. v. Meyers*, 35 S. W. Rep. 421; *Cincinnati, H. & I. R. Co. v. Revalee*, 46 N. E. Rep. 352; *Filer v. N. Y. C. R. Co.* 49 N. Y. 47; *McIntyre v. N. Y. C. R. Co.* 37 id. 287; *Cincinnati, H. & I. R. Co. v. Carper*, 112 Ind. 26; *Watkins v. R. & A. A. L. R. Co.* 116 N. C. 961; *Gulf, C. & S. F. R. Co. v. Brown*, 4 Tex. Civ. App. 435; *Carr v. E. R. & E. R. Co.* 98 Cal. 366. An attempt to leave a moving train does not show negligence *per se*. *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542; *Pennsylvania Co. v. Marion*, 123 id. 415; *Geiler v. Manhattan R. Co.* 32 N. Y. Supp. 254; *Atchison, T. & S. F. R. Co. v. Hughes*, 55 Kan. 491; *Hooks v. A. & V. R. Co.* 73 Miss. 145; Wharton, Neg. § 380; *Delaware & H. C. Co. v. Webster*, 6 Atl. Rep. 841; *St. Louis, I. M. & S. R. Co. v. Person*, 49 Ark. 182; *Pool v. C., M. & St. P. R. Co.* 53 Wis. 657, 660; 2 Wood, Railway Law, 1130–1132, 1136, 1148, 1149; 2 Abbott, Dig. Corp. 598; *Eddy v. Wallace*, 49 Fed. Rep. 801; *Bucher v. N. Y. C. & H. R. R. Co.* 98 N. Y. 128; *Cousins v. L. S. & M. S. R. Co.* 96 Mich. 386.

For the respondent there was a brief by *Fish & Cary*, and oral argument by *A. L. Cary*. They argued, among other things, that where cars do not stop at their usual stopping place, and, to avoid being carried beyond his destination, a passenger, when the cars are in motion, jumps off and in doing so sustains an injury, he cannot recover. Wood, Railway Law, 1133, note 2; Id. 1136, note 3; *Damont v. N. O. & C. R. Co.* 9 La. Ann. 441; *Railroad Co. v. Aspell*, 23 Pa. St. 147; *Ill. Cent. R. Co. v. Able*, 59 Ill. 131; *Gavett v. M. & L. R. Co.* 16 Gray, 501; *Jeffersonville R. Co. v. Hendricks' Adm'r*, 26 Ind. 228; *Jeffersonville R. Co. v. Swift*, id. 459; *Davis v. C. & N. W. R. Co.* 18 Wis. 175. The complaint does not bring the case within the rule governing cases where a conductor or brakeman is present and advises or encourages a passenger to step or jump from a moving

train, but is analogous to cases where a train does not stop at a station where it is scheduled to stop, or where the conductor has promised a passenger that the train will stop, and it does not come to a stop, and the passenger, to avoid being carried to the next station, jumps from the train while it is running at a high rate of speed and is injured. In such cases the railroad company is not liable. *Detroit & M. R. R. Co. v. Curtis*, 23 Wis. 152; *Secor v. T. P. & W. R. Co.* 10 Fed. Rep. 15; *Hickey v. B. & L. R. Co.* 14 Allen, 429; *Kentucky C. R. Co. v. Thomas's Adm'r*, 79 Ky. 160; *Brown v. C., M. & St. P. R. Co.* 80 Wis. 162; *Ill. Cent. R. Co. v. Green*, 81 Ill. 19; *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318; *Jarrett v. A. & W. P. R. Co.* 83 Ga. 347; *Watson v. G. P. R. Co.* 81 id. 476; *Chicago & A. R. Co. v. Randolph*, 53 Ill. 510; *Burden v. L. S. & M. S. R. Co.* 104 Mich. 101; *Lucas v. N. B. & T. R. Co.* 6 Gray, 64.

NEWMAN, J. In order to state a cause of action against the defendant, the complaint must allege such facts as show that the defendant failed in the performance of some duty which it owed to the plaintiff, and that such neglect of duty caused the plaintiff's accident. It is claimed that, under the circumstances, the defendant owed to the plaintiff the duty to stop its train at Jackson, so as to permit him to alight there. But the plaintiff's presence upon the train without a ticket, and in ignorance of the regulation which prevented it to stop at Jackson, was not through any fault or inadvertence of the defendant. By inquiry at the station before entering upon the train, he would have learned of the regulation. It was his duty to ascertain this for himself, and to regulate his conduct accordingly. Even if he had bought a ticket at the station, that would not have put upon the defendant the duty to stop its train at Jackson contrary to its published schedule arrangements. *Plott v. C. & N. W. R. Co.* 63 Wis. 511. When he received the information that

the train would not stop at Jackson, it was too late to prevent a predicament. The train had left the station, and had entered upon its scheduled and advertised journey. Without important reason, it should not be hindered or delayed. The conductor's duty, in the circumstances, was not doubtful. On payment of the proper fare, it was to carry the plaintiff to such station near to Jackson as the plaintiff should choose, and at which the train was scheduled to stop. It was, no doubt, the conductor's duty to run the train according to the published schedule, and he had no power to bind the company by any change from such schedule. Nor was it within his apparent power to make such change. So the plaintiff had no right to infer that the conductor had any power to bind the company by a promise to stop or slow up at Jackson. *Plott v. C. & N. W. R. Co., supra.* From these considerations, it is plain that the defendant owed to the plaintiff no duty to stop the train at Jackson. So the failure to stop the train was no wrong of which he can complain.

The only wrong which is plainly alleged in the complaint is the conductor's promise to slow up the train. The promise was one which he had no right either to make or to keep. It does not plainly appear whether he in fact kept the promise. It does appear that the train was somewhat slowed up. The plaintiff thought the promise was being kept. After he had been carried some distance by the station, and when it did not appear to be slowing up any more, he jumped. No one advised him that it was safe to jump. No one knew that he was about to jump. He jumped on his own judgment that it was safe to do so. It was certainly a rash act, and its consequence to the plaintiff was serious. Nothing but his minority could relieve the plaintiff from responsibility for the act. If he had been four years older, there could be no question that he assumed and must bear the consequences of the act. But he was only seventeen years old. So great discretion cannot be required of him as if he had

been twenty-one years old. But it is required of him that he exercise such a degree of judgment and prudence as is ordinarily exercised by persons of similar age, experience, and intelligence. It does not appear that he was not a boy of ordinary intelligence. He lived in Milwaukee. He had on several occasions made journeys by railroad alone. He was not of such immature years as to be relieved from all responsibility for prudent conduct. His experience was such as to acquaint him with the fact that there was danger in jumping from a moving train. It must be held that he jumped at his own risk.

Even if this were not so, it is not easy to apprehend how the failure to stop the train could be the proximate cause of the plaintiff's accident. The natural consequence would be that plaintiff would be carried by the station. If this was a breach of a binding contract of carriage, it would furnish ground for appropriate damages. But that the plaintiff should jump from the train while in rapid motion was neither a natural nor probable consequence of the failure to stop the train. And so it could not well be anticipated. For that reason, it was not the proximate cause of the plaintiff's accident. *Block v. Milwaukee St. R. Co.* 89 Wis. 371.

By the Court.—The order of the superior court of Milwaukee county is affirmed.

WINSLOW, J., dissents.

MITCHELL and another, Trustees, Respondents, vs. THE WESTERN PAVING & SUPPLY COMPANY, imp., Appellant.

April 8 — April 30, 1897.

Wells v. Western Paving & Supply Co., ante, p. 116, followed.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Hoyt, Ogden & Olwell*, and oral argument by *F. M. Hoyt.*

For the respondents there was a brief by *Howard & Mallory*, and oral argument by *Samuel Howard* and *R. B. Mallory.*

MARSHALL, J. The questions in this case are the same as those in the case of *Wells v. Western Paving & Supply Co.*, *ante*, p. 116. For the reasons therein stated, the judgment and mandate following must be entered.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for further proceedings according to law.

KNEELAND, Respondent, vs. THE WESTERN PAVING & SUPPLY COMPANY, imp., Appellant.

April 8—April 30, 1897.

***Wells v. Western Paving & Supply Co., ante*, p. 116, followed.**

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Hoyt, Ogden & Olwell*, and oral argument by *F. M. Hoyt.*

For the respondent there was a brief by *Howard & Mallory*, and oral argument by *Samuel Howard* and *R. B. Mallory.*

MARSHALL, J. All the questions presented on this appeal were decided in *Wells v. Western Paving & Supply Co.*, *ante*, p. 116. Following that case, the judgment of the circuit court is reversed, and the cause remanded for further proceedings according to law.

By the Court.—So ordered.

BOYD, Respondent, vs. THE WESTERN PAVING & SUPPLY COMPANY, imp., Appellant.

April 8 — April 30, 1897.

Wells v. Western Paving & Supply Co., ante, p. 116, followed.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Hoyt, Ogden & Olwell,* and oral argument by *F. M. Hoyt.*

For the respondent there was a brief by *Howard & Mallory,* and oral argument by *Samuel Howard* and *R. B. Mallory.*

MARSHALL, J. The questions presented in this case are the same as those decided in *Wells v. Western Paving & Supply Co., ante,* p. 116. That case rules this.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for further proceedings according to law.

FOLLANSBEE and others, Respondents, vs. KELLNER, imp., Appellant.

April 8 — April 30, 1897.

Levy v. Wilcox, ante, p. 127, followed.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Hoyt, Ogden & Olwell,* attorneys, and *George Lines,* of counsel; a brief in reply by *Hoyt, Ogden & Olwell;* and the cause was argued orally by *F. M. Hoyt.*

For the respondents there was a brief by *Howard & Mallory*, and oral argument by *Samuel Howard* and *R. B. Mallory*.

MARSHALL, J. This action is ruled by *Levy v. Wilcox*, *ante*, p. 127.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded with directions to dismiss the complaint and enter judgment barring the action to void the tax-sale certificate and the proceedings on which it was based, under sec. 1210*h*, S. & B. Ann. Stats., and for costs in favor of defendant *Kellner*, to be taxed according to law.

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ENOS and another, Executors, Appellants, vs. SANGER and another, Respondents.

April 8 — April 30, 1897.

Agreement to pay debt of third person as part of purchase price of land.

Where the grantee in a conveyance has assumed and agreed to pay, as part of the purchase price of the premises, a debt owing to a third person, the latter may maintain an action on the agreement, although the grantor was not liable for the debt and no consideration passed to the grantee from such third person or his debtor.

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Reversed.*

On the 29th day of April, 1893, *Casper M. Sanger* executed to plaintiffs a mortgage upon certain real estate to secure the payment of $22,500 at the times and with the interest therein provided for. On the 25th day of July, 1893, the mortgagor, by deed with full covenants except as to such mortgage, conveyed such real estate to Emil and Alfred T. Sanger. On the 19th day of August, 1893, the last-

named grantees, by a deed with full covenants except as to the aforesaid mortgage, conveyed such real estate to the *C. M. Sanger Sons Company*. Such deed contained a clause in the usual form, to the effect that the grantee, *C. M. Sanger Sons Company*, assumed and agreed to pay the said mortgage debt. Default was made in the payment of interest accruing on such debt, and thereupon this action was brought to foreclose such mortgage. The complaint contained the usual prayer for relief to the effect that the decree should provide for personal judgment against all parties personally liable for the mortgage debt in case of a failure to realize a sufficient sum from a sale of the property to satisfy such debt, with interest and costs. All the facts were found as above set forth. The trial court held that the *C. M. Sanger Sons Company* was not personally liable for the mortgage debt, and thereupon judgment was entered as prayed for in the complaint, except in respect to providing for a deficiency judgment against the *C. M. Sanger Sons Company*. Plaintiffs thereupon appealed from that part of the judgment refusing to provide for such a deficiency judgment.

For the appellants there was a brief by *Miller, Noyes, Miller & Wahl*, and oral argument by *Geo. H. Wahl*.

Charles F. Hunter, of counsel, for the respondents, contended, *inter alia*, that where the grantor is not personally bound to pay the mortgage debt, his grantee does not become bound by reason of having assumed the payment of the mortgage debt in the deed. *Vrooman v. Turner*, 69 N. Y. 280; *Norwood v. De Hart*, 30 N. J. Eq. 412, 414; *King v. Whitely*, 10 Paige, 465; *Trotter v. Hughes*, 12 N. Y. 74. The property, according to all the evidence, was sold to Emil A. and Alfred T. Sanger for $30,000, paid to the grantor by the grantees. The mortgage of $22,500 was excepted from the covenants of this conveyance. The grantees therein conveyed the property to the defendant company for $30,000 paid to them by said company, the receipt of which the

grantors acknowledged. The deed was made with covenants that the premises were free from incumbrances "except a mortgage of $22,500 thereon, which grantee is to pay." The grantors had no interest in the payment of the mortgage. The deed does not state that the payment of the mortgage is a part of the consideration for the conveyance, and a fair construction of the terms of the instrument cannot read into it such an intent. The findings of the court do not show that the promise of the *C. M. Sanger Sons Company* to pay the mortgage was a part of the consideration for the conveyance. The findings could not show this because the undisputed evidence contained in the deed showed that the consideration had been fully paid. This construction of the clause in question is supported by *Brown v. Stillman*, 43 Minn. 126; *Nelson v. Rogers*, 47 id. 103; *Morris v. Mix*, 4 Kan. App. 654.

MARSHALL, J. The decisions of the various courts are by no means uniform, either in respect to the binding effect of a covenant by a grantee of land to pay the consideration therefor to a third person, or the ground upon which the obligation rests, if sustained. It is useless to review and try to harmonize the various adjudications. In fact, it is difficult to find a line upon which they can be harmonized respecting the ground of the liability. In this state the liability rests upon the doctrine that where one person, for a valuable consideration, engages with another to do some act for the benefit of a third person, the latter may maintain an action against the promisor for the breach of the agreement. Such doctrine is the settled law in this state. *Bassett v. Hughes*, 43 Wis. 319; *Hoile v. Bailey*, 58 Wis. 434; *Grant v. Diebold S. & L. Co.* 77 Wis. 72; *Kollock v. Parcher*, 52 Wis. 393, and many other cases that might be cited. All that is required to render such rule applicable is for the obligor, for a sufficient consideration to support the promise,

to agree to do some act for the benefit of a third person. No question of subrogation or novation is involved. Such third person, whether sustaining any relation to the person with whom the agreement is made or not, or to the person from whom the consideration moves, may adopt such promise made for his benefit, and thereby bring himself into privity with the obligor, and enforce the promise. While the incidental effect of the execution of such promise is to discharge the debt of another to such third person, such promise is really to pay the debt of the promisor, to perform his own contract, entered into for a sufficient consideration to support it. *Kollock v. Parcher, supra; Hoile v. Bailey, supra.*

In *Bishop v. Douglass*, 25 Wis. 696, the liability of the grantee to pay the mortgage debt was placed on the ground that he received the conveyance subject to a condition, and thereby became bound to perform it, which, as applied to the facts of that case, is only another way of stating the rule before referred to. In *Palmeter v. Carey*, 63 Wis. 426, the liability was based on the same principle, though, as in *Bishop v. Douglass, supra*, the rule was not distinctly stated other than by saying that "the grantee became liable for payment of the mortgage debt by making a valid promise to pay it." In *Brewer v. Dyer*, 7 Cush. 337, the principle is stated in the language of Mr. Justice CRAIG as follows: "Thus, upon the principle of law long recognized and clearly established, where one person, for a valuable consideration, engages with another to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such agreement. It does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, but upon a broad and more satisfactory basis that the law, operating upon the acts of the parties, creates the debt, establishes the privity, and implies the promise and obligation on which the action is founded."

In most, if not all, jurisdictions where the liability of a grantee to pay a debt secured upon the property conveyed to him, because of his promise in the conveyance, is sustained on the ground stated, the fact of whether the grantor was liable for the debt or not is held immaterial. *Dean v. Walker*, 107 Ill. 540; *Bay v. Williams*, 112 Ill. 91; *Merriman v. Moore*, 90 Pa. St. 78; *Hare v. Murphy*, 45 Neb. 809.

From the foregoing authorities which more directly state the doctrine that has long prevailed in this state, applicable to this class of cases, than any case in our own court, and from the general principle upon which such cases rest, that has long been the settled law here, we deduce the following: Where a grantee, in the conveyance to him, assumes and agrees to pay the debt of a third person as part of the consideration for his purchase, there is no necessity for any consideration to pass from such third person or his creditor to such grantee to support such agreement; a portion of the consideration for the purchase being left in such grantee's hands, appropriated by the grantor to the payment of the debt which such grantee agrees to pay in consideration of the conveyance and of such appropriation of the purchase money, he cannot be heard to object to the performance of his contract because his grantor was not liable for such debt. When the grantor makes such an appropriation, and the grantee, for a sufficient consideration, promises to pay the amount so appropriated to the creditor of such third person, such grantee thereby becomes liable to such creditor; and such liability rests solely on such consideration and such promise.

By the Court.— The judgment of the superior court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

The general question of the right to sue upon a contract made between other parties for the benefit of the plaintiff is the subject of an extensive note to *Jefferson v. Asch* (53 Minn. 446), in 25 L. R. A. 257.— REP.

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THE GERMAN AMERICAN BANK, Respondent, vs. DEVLIN, Garnishee, Appellant.

April 8—April 30, 1897.

Voluntary assignment: Bond of assignee: Failure of officer to sign jurat of affidavit of sureties: Garnishment.

The court commissioner before whom the sureties on the bond of an assignee made affidavit as to their responsibility as required by sec. 1694, R. S., approved and filed the bond without signing the jurat of the affidavit. Subsequently, without obtaining leave of court to amend the proceedings, he attached his signature while the affidavit was on file in the clerk's office. *Held*, that the assignment was void as to a creditor of the assignor who commenced garnishment proceedings before the signature was attached.

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Affirmed.*

The facts are stated in the opinion.

J. M. Clarke, for the appellant.

For the respondent there was a brief by *Hoyt, Ogden & Olwell*, attorneys, and *Jackson B. Kemper*, of counsel, and oral argument by *F. M. Hoyt* and *L. A. Olwell.* To the point that the signature to the jurat is essential to make a valid affidavit, they cited *Royston's Appeal*, 53 Wis. 612, 623; *Kidder v. Fay*, 60 id. 218; *McDermaid v. Russell*, 41 Ill. 489; *Westerfield v. Bried*, 26 N. J. Eq. 357, 359; *State v. Green*, 15 N. J. Law, 88, 90; *Alford v. McCormac*, 90 N. C. 151; *Morris v. State*, 2 Tex. App. 502; *Swiney v. State*, 119 Ind. 478; *Cantwell v. State*, 27 id. 505; *Bank v. Hinchcliffe*, 4 Ark. 444.

CASSODAY, C. J. It appears from the record, and is in effect found by the court, that December 7, 1895, the defendant Phillip H. Murphy made a voluntary assignment to the garnishee, *James J. Devlin*, for the benefit of his creditors, and filed the same in the office of the clerk of the circuit

court on that day; that among the assignment papers so filed was a bond executed by *Devlin* to the said clerk, conditioned as provided by law, with two sureties, who were sworn by the court commissioner and testified on oath as to the facts stated in the form of affidavit annexed to said bond; that upon said bond was indorsed the approval of the court commissioner; that attached to the bond was an affidavit of the sureties, duly signed by both of them, but the jurat of said affidavit was not signed by the court commissioner, or any other person; that after the filing of the assignment and said bond in that condition this action was commenced against Murphy, as principal defendant, and *Devlin* was garnished; that thereafter the court commissioner attached his signature to the jurat of the affidavit of the sureties while the same was on file in the office of the clerk; that no order was ever entered or made authorizing or allowing an amendment to the proceedings; that at the time of the service of the garnishee summons the garnishee had in his possession and under his control personal property and effects belonging to Murphy, which he claimed to hold as such assignee, and in no other manner, and with no lien or interest therein; that subsequently, and prior to the trial, the garnishee sold and converted into money the property so assigned, and received therefor $953, which remained in his possession; that the garnishee had still other property of Murphy, held under the assignment, to the amount of $576.25. And as conclusions of law the court found, in effect, that *Devlin* was liable herein as garnishee. From the judgment entered thereon accordingly the defendant *Devlin*, as such garnishee, brings this appeal.

We are clearly of the opinion that the trial court properly held that the assignment was void, as against the plaintiff, at the time the garnishee papers were served, by reason of the failure of the commissioner to sign the jurat; and hence that the assignee was properly held liable in garnishment. This

is obvious from numerous adjudications of this court. It is unnecessary to do more than to quote some things said by this court, and directly applicable to the case at bar. In *Grever v. Culver*, 84 Wis. 298, Mr. Justice PINNEY, speaking for the court, among other things said: "The provisions of secs. 1694–1696, in respect to the execution and approval of the bond of the assignee, and as to the manner of execution of the assignment, including the indorsement on the copy thereof of the certificates of the assignee and of the county judge or court commissioner, and of filing the same, have invariably been held mandatory in all cases in this court under these sections, and that no assignment can be perfected which will be valid as against creditors until the requisites here prescribed have been complied with. Until then the trust in favor of creditors has not been legally formed, and the property of the assignor is subject to attachment or other process in favor of any of his creditors. . . . Inasmuch as they are mandatory, the court has no right to enter into any discussion of their wisdom or propriety with a view of dispensing with their observance. It is enough to know that thus the law is written, and that, where the act requires a thing to be done in a particular way, that manner alone must be adopted. . . . The filing of the bond and the copy of the assignment with the proper indorsements thereon is a condition precedent to passing the title to the assignee as against the creditors of the assignor. Until the legislature sees fit to alter the rule, we must adhere to these decisions." The adjudications in this court on the subject are there reviewed in a manner which requires nothing further to be here added.

By the Court.—The judgment of the superior court of Milwaukee county is affirmed.

DOCTER and others, Respondents, vs. RIEDEL and another, Appellants.

April 8 — April 30, 1897.

(1) *Abuse of process.* (2) *Banks and banking: Application of deposit on note.*

1. To sustain an action for malicious abuse of process, the process must have been used to accomplish some unlawful end, or to compel the person against whom it runs to do some collateral thing which he could not legally be compelled to do. Thus, entering judgment on a judgment note after 10 o'clock at night, and immediately levying an execution thereon by forcibly breaking into the debtor's store, with the intent to injure his credit and business reputation, the creditor all the time knowing that the debtor was solvent and ready and willing to pay the note upon demand, does not render the creditor liable to such an action. MARSHALL, J., dissents, being of the opinion that if process to collect a judgment be executed in an unnecessarily harsh and oppressive manner, with a malicious purpose to injure the judgment debtor, such conduct constitutes an actionable wrong.
2. A bank having money on open account to the credit of the maker of a note which it holds is not obliged to apply the money thereon before bringing suit, even if it has the right to make such application without consent.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

This is an action for the abuse of process. The complaint, after alleging the copartnership of the plaintiffs, and the corporate character of the defendant the *German American Bank*, alleges that on the 31st of August, 1895, the plaintiffs executed to the bank their judgment note in the sum of $5,000, payable on demand with interest. A copy of said note is attached, and a warrant of attorney authorizes any attorney in any court of record to appear in such court, "in term time or vacation, at any time hereafter, and confess a judgment, without process, in favor of the holder of this

note, for such amount as may appear to be unpaid thereon, together with costs, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution on said judgment."

The complaint further alleges that plaintiffs also executed to the bank a real-estate mortgage as security for the payment of said note, and that they had on deposit in such bank on the 11th of October, 1895, the sum of $850; that they were engaged in the business of merchant tailoring immediately adjoining the Plankinton House, in the city of Milwaukee, with a stock of goods of more than $13,000 in value, and that their total assets exceeded $43,000; that their liabilities, including the note, did not exceed $13,000; that they were perfectly solvent, and able to pay said note on demand, to the knowledge of defendants, and were doing a large and profitable business, and had many customers, and their standing in the commercial world was first class, and their credit good; that on the 11th of October, 1895, the defendant bank and the defendant *Riedel* conspired together for the purpose of destroying plaintiffs' credit and business, and without any demand or notice to plaintiffs, having first assigned said note to the defendant *Riedel*, caused a judgment to be entered in the circuit court for Milwaukee county on said note, and thereafter, about the hour of 10 o'clock in the evening of said day, caused an execution to be issued upon said judgment, and to be placed in the hands of the sheriff of Milwaukee county, who proceeded, about 11 o'clock P. M. of said night, to forcibly break into the store of plaintiffs, through the door leading from the hotel waiting room, and then and there levied on the entire stock of the plaintiffs.

The complaint further alleges that the note was assigned to defendant *Riedel* without consideration; that the levy was made at the unseasonable hour aforesaid without any notice to plaintiffs, and with the purpose of injuring their

credit and reputation, and that they had been at all times ready and willing to pay said note upon demand; and that they did, immediately upon being notified of said judgment and levy, pay the same to said defendants, and procured said levy to be released and said judgment satisfied. All of said acts of defendants are alleged to have been done maliciously, and with the intent of injuring the plaintiffs' credit and business reputation. The complaint further alleges that plaintiffs were put to great expense in obtaining the dissolution of said judgment and the release of said levy, and put to great inconvenience and expense, to their damage in the sum of $10,000.

To this complaint a general demurrer was interposed, which was overruled, and the defendants appealed.

The cause was submitted for the appellants on the brief of *Hoyt, Ogden & Olwell*, and for the respondents on that of *Julius E. Roehr*.

WINSLOW, J. The complaint charges, in brief, that the defendants, without previous demand, entered judgment upon a judgment note at 10 o'clock at night, and immediately issued execution thereon, and broke into the plaintiffs' store, and levied upon their stock of goods, with the malicious intent thereby to injure and destroy the plaintiffs' business credit and reputation, and that the plaintiffs, on being informed of the seizure, immediately paid the judgment and procured release of the levy. Plainly, the complaint does not state a case of malicious prosecution of a civil action, because the action ended favorably to the present defendants; thus demonstrating that there was not only probable, but perfect, cause for bringing it. *O'Brien v. Barry*, 106 Mass. 300.

It is claimed, however, that a cause of action is stated for abuse of process. The authorities upon the question of what will constitute a cause of action for abuse of process are

certainly in a state of some confusion, and frequently this action seems to have been confounded with actions for malicious prosecution, although they are essentially different actions. The leading case on the subject, perhaps, is the case of *Grainger v. Hill*, 4 Bing. N. C. 212. Here the plaintiff was arrested at a time when he could not procure bail, and kept under arrest until he surrendered a ship's register. The *capias* was a valid writ, regularly issued upon a good cause of action, but it was used to effect an ulterior and illegitimate purpose; and for that use there was held to be a remedy in tort, regardless of the question whether the original action was determined, or whether it was founded on probable cause. So, where an execution is issued upon a judgment already paid, or for an excessive amount, and goods are levied upon, a remedy is given. In these and similar cases, as said by an eminent text writer, "it is enough that the process was wilfully abused to accomplish some unlawful purpose." Cooley, Torts (2d ed.), 220, 221. This is probably the test, namely, whether the process has been used to accomplish some unlawful end, or to compel the defendant to do some collateral thing which he could not legally be compelled to do. *Johnson v. Reed*, 136 Mass. 421.

Applying this test to the case before us, we do not discover any cause of action stated. The process of the court has been used to collect a valid debt, and in precisely the manner that the plaintiffs here consented to its use by the judgment note. By this instrument the plaintiffs authorized its holder to enter judgment and issue execution at any time, and this is all that has been done. The defendants seem to have acted strictly within their right. The general rule is that, where one exercises a legal right, his undisclosed motives are immaterial. *Phelps v. Nowlen*, 72 N. Y. 39; *Raycroft v. Tayntor*, 68 Vt. 219, 33 L. R. A. 225. We see no reason why the rule should not apply here. The defendants having collected their debt in a way which they were

authorized to use, we cannot punish them for their secret motives.

The plaintiffs had an open account at the bank, upon which there stood $850 to their credit, and they claim that this should have been applied upon the note. Whether the bank had a right to make such an application without consent may be doubtful, but, whether it could do so or not, we see no reason for holding that it was obliged to do so.

By the Court.—Order reversed, and action remanded with directions to sustain the demurrer.

MARSHALL, J. I understand the decision of the court to be to the effect that if a person is in the mercantile business, and unquestionably solvent, to the knowledge of another to whom he is indebted on a judgment note, the circumstances being that such other knows he can obtain payment of such note on demand, he may, notwithstanding, with the malicious purpose to destroy the credit of his debtor and break up his business, enter judgment on such note at 10 o'clock at night, immediately issue an execution thereon, and, in the absence of such debtor (his place of business being closed for the night), cause an officer to break into such place and take possession of such debtor's stock in trade, without having made any demand for payment of the debt, or demanding entrance to the store, or giving the debtor any notice whatever that immediate payment of the debt is required, thereby maliciously causing unnecessary and serious pecuniary injury to such debtor; and that such conduct constitutes no wrong, or, if it does, it is without legal redress. If there is no remedy for such an official outrage, it must stand as a striking example of the insufficiency of our system of jurisprudence to deal with a class of serious malicious injuries that may break down a prosperous business, involve its owner in utter ruin, turn his condition of solvency to one of insolvency, and make him a beggar in a day. I must re-

spectfully dissent from that doctrine, and protest that no such imperfection exists in the remedies afforded by our laws. That the reasoning upon which the decision of my brethren rests leaves such a wrong without a remedy is of itself an infallible test of its fallacy.

Actionable injuries, growing out of what is commonly called abuse of process, consist of two classes: One where the process of the court is not used for its legitimate purpose, but to accomplish by coercion some outside object not within the proper use of the process, as in *Grainger v. Hill*, 4 Bing. N. C. 212, cited in the opinion of the court, where the injured party was arrested on a valid writ in order to coerce him into delivering a ship's register, which was entirely outside of the legitimate purposes of the writ. My brethren test the complaint here solely by *Grainger v. Hill* and similar cases, and the elementary principle that abuse of process, strictly so called, is the use of process regularly issued to accomplish an unlawful end or to compel the defendant to do some collateral thing. Thereby the conclusion is easily reached that the complaint does not state a cause of action. But there is another class of malicious injuries growing out of abuse of process, sometimes designated as malicious misuse of process, that has been, to my mind, entirely overlooked, to which class the case made by the complaint belongs, and within the rules of which a good cause of action is clearly stated. Such class includes the use of process to accomplish its legitimate object, but in a reckless, unnecessarily oppressive way, with wrong intent to injure the person against whom the process runs. Such misuse is actionable, because of the unnecessary injury inflicted and the motive of it. The two classes of injuries referred to are recognized in *Mayer v. Walter*, 64 Pa. St. 283, which is a very instructive case on the subject. The court there held, in effect, that malicious abuse of process is where it is used for some unlawful object not within its scope, but that

malicious misuse of process may take place where no object but its proper and legitimate execution is contemplated. Here the object intended was the execution of the judgment. Defendant had a legal right to collect it, but the proceedings to that end were unnecessarily harsh and oppressive, and with bad intent; hence the actionable injury.

Rogers v. Brewster, 5 Johns. 125, which will be found cited by all standard text writers, touches this case at every essential point. The officer had ample opportunity to execute his writ by taking property that would not interfere seriously with the debtor's business. Instead of doing so, he took a horse from the team with which such debtor was at work, with intent to embarrass and injure him. In deciding the case the court said: "The constable appears to have executed the warrant in an unreasonable and oppressive manner, and with the avowed and malicious design to harass and oppress the plaintiff. The oppression of an officer in the execution of process is indictable, and a great abuse of the powers of a sheriff on execution has been held sufficient to make him a trespasser. If he be charged with a malicious and oppressive proceeding, a proper remedy for this abuse of power is a special action on the case, in which the malice and oppression must be made manifest. The seizing and selling of the horse in the case before us was without any just cause, so long as other property was shown which would have raised the money with equal facility. It was therefore a causeless and malicious proceeding. Where a ministerial officer does anything against the duty of his office, and damage thereby accrues to the party, an action lies." To the same effect are *Juchter v. Boehm*, 67 Ga. 534; *Snydacker v. Brosse*, 51 Ill. 357. In *Casey v. Hanrick*, 69 Tex. 44, the officer and the execution plaintiff, who ratified the officer's act, were held liable for the malicious conduct of the latter in executing the writ in a hasty and oppressive manner at a time when it subjected defendant and his family

to unnecessary hardship. Many cases of the same kind exist in the books, but time will not permit calling attention to them further than is necessary to show clearly my reasons for holding that the complaint in the instant case states a cause of action.

The whole subject might well rest on *Smith v. Weeks*, 60 Wis. 94. There the officer had a warrant to arrest Weeks in contempt proceedings. The latter was a locomotive engineer. He was at home all day, to the knowledge of the officer, and might have been arrested and the object of the writ satisfied, without seriously embarrassing him. It was his duty to go out with his engine at night, which the officer knew, yet for the purpose of embarrassing and unnecessarily oppressing Weeks, the officer waited till he was about to go out on his night run, and then arrested him. The court held that such conduct constituted an official outrage and a clear abuse of process. There were many aggravating circumstances which occurred after the arrest, but the court held clearly that the arrest itself, under the circumstances, and the motive of it, constituted abuse of process.

From the foregoing, the principle governing this subject may be stated thus: If process to collect a judgment be executed in an unnecessarily harsh and oppressive manner, with a malicious purpose to injure the judgment debtor, such conduct constitutes an actionable wrong. In executing such a process the officer must not be guilty of oppression, or make use of greater force or violence than the thing requires. If he does, he is guilty of an abuse of process, and liable for damages. Alderson, Judicial Writs, 514, § 179. Applying the above-stated principle to the complaint before us, the order overruling the demurrer to the complaint was obviously right, and should be sustained.

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MOMSEN, Assignee, Appellant, vs. PLANKINTON, Assignee, Respondent.

April 10 — April 30, 1897.

Appeal: Findings, when disturbed: Voluntary assignment: Fraudulent conveyances.

1. The rule that findings of the trial court or of a referee will not be disturbed unless clearly against the preponderance of the evidence applies to all trials by the court or a referee, in equitable as well as in legal actions, including cases where the testimony is taken by a referee and reported to the court.
2. In a proceeding to set aside as fraudulent and void, under sec. 1693*a*, S. & B. Ann. Stats., transfers and conveyances made to a bank by its manager (who shortly thereafter made a voluntary assignment), to secure the latter's indebtedness to the bank, the evidence is *held* sufficient to sustain a finding that the bank did not know, or have reasonable cause to believe, the debtor to be insolvent at the time of the transfers.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

This was an application by the assignee for the benefit of the creditors of Frederick T. Day, on petition, for an order setting aside certain transfers and conveyances made by Day, before his assignment, to the Plankinton Bank, as security for debts due from him to the bank.

Day was the vice president and general manager of the bank. He carried on a large outside business of his own. He was reputed to be, and believed himself to be, a man of large wealth, and entirely solvent. He drew aid for his own business from the bank, and became largely indebted to it. The bank pressed for security. On the 3d day of April, 1893, an arrangement was made between Day and the bank for the transfer by Day to the bank of certain designated property as security for his liability to the bank. This agreement was subsequently carried out by Day, and all the

designated property was transferred to the bank at convenience and before the 1st day of June following. A large part of the transfers were made in May, 1893. The value of the property transferred was estimated at upwards of $460,000. His indebtedness to the bank was upwards of $300,000. On June 1, 1893, the Plankinton Bank made an assignment for the benefit of its creditors to *William Plankinton*, the respondent. On the 3d day of June, 1893, Day made an assignment for the benefit of his creditors to the petitioner. The petition asked to have the transfers set aside on the ground that they are void as to the other creditors of Day, by force of sec. 1693*a*, S. & B. Ann. Stats., which reads, in part, as follows: "Every sale, mortgage, hypothecation, lien or other security of any name or nature, made, given or executed of or upon his property, real or personal, by an insolvent debtor, within sixty days prior to the making of any such assignment, and in contemplation thereof, or of insolvency, shall be void and of no effect; provided, the vendee in such sale, or the person benefited thereby, or receiving such mortgage, hypothecation, lien or other security, knew or had reasonable cause to believe such debtor insolvent."

The trial court found against the petitioner, in substance, that, at the time of the transfers, Day was unable to meet his obligations as they matured; but that it is not shown that his assets were not then, at the then ruling prices and values, sufficient for the payment of all his debts in full; that at the time of making such transfers he did not contemplate making an assignment for the benefit of his creditors, or insolvency; that the transfers were not made in contemplation of such an assignment or of insolvency; that the Plankinton Bank did not know, or have reasonable cause to believe, that Day was insolvent; and that the transfers were made in pursuance to, and in performance of, the agreement of April 3, 1893, in good faith, and not in contemplation of

any assignment or insolvency. This finding was followed by an order dismissing the petition on the merits, with costs. The appeal is from that order.

For the appellant there were briefs by *Elliott & Hickox*, and oral argument by *E. S. Elliott* and *C. T. Hickox*.

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *F. C. Winkler*.

NEWMAN, J. The only question presented by this appeal is whether the findings of the trial court are sufficiently supported by the evidence. If they are so supported, they cannot be overthrown here. The burden was on the petitioner to satisfy the trial court, by evidence, of the truth of his contention. He failed to so satisfy the court. The findings of the trial court cannot be disturbed here unless it is made to appear to this court that the evidence produced in the trial court was so strong and cogent as that the trial court ought, reasonably, to have been convinced by it. For it is well established by a long and uniform line of decisions that this court will not reverse the findings of the trial court, or of a referee, unless they are clearly against the preponderance of the evidence. This rule applies to all trials by the court or a referee, in equitable as well as in legal actions. *Ely v. Daily*, 40 Wis. 52; *Norris v. Persons*, 49 Wis. 101; *Stanley v. Risse*, 49 Wis. 219; *Gœtz v. Salomon*, 55 Wis. 310; *Althouse v. Baldwin*, 56 Wis. 398; *Anderson v. Wehe*, 62 Wis. 401; *Bruce v. Miller*, 72 Wis. 404; *Zimmerman v. Chambers*, 79 Wis. 20; *Hosmer v. McDonald*, 80 Wis. 54; *La Coursier v. Russell*, 82 Wis. 265. The rule applies as well where the testimony, as in this case, is taken by a referee and reported to the court. *Ely v. Daily, supra; Hosmer v. McDonald, supra.* If the force of this rule were better realized by the profession, it would prevent many fruitless appeals.

There is indeed very little, if any, evidence to show that,

at the time when he made the transfers, Day was contemplating the making of an assignment for the benefit of his creditors, or that he believed that he was in an insolvent or failing condition. There is much which tends to show the contrary. He believed that he was a man of wealth and ample means. He expected to continue his business, and believed that he had ample property to pay all his debts and leave a handsome surplus. But the failure of the bank precipitated his affairs. The advance of panic, with the shrinkage of all values, brought all his *chateaux en Espagne* in sudden destruction about his unfortunate head. It can hardly be believed that Day really contemplated a financial cataclysm, or discerned the impending necessity which so soon compelled his assignment. It seems to be always possible, after the event, to discover plausible reasons why it should have been foreseen; but it should be remembered that the retrospect has this advantage, at least, that it is illuminated by facts which gave but little, or uncertain, light to the prospect. Such facts should be viewed only in reference to the light which they actually shed upon the prospect.

Had the bank reasonable cause to believe that Day was insolvent? The bank, of course, knew of Day's large indebtedness to it. But it did not know of any considerable indebtedness which he owed elsewhere, or that he was incurring indebtedness elsewhere. It knew that he was a man of large property and was doing a large business. It knew that he owned a large amount of lands in the states of Minnesota and the Dakotas, which were estimated to be of large value. And while it knew that he did not meet promptly his obligations to it, and that he was probably unable to do so in the usual course of his business, it was yet willing to take his securities. For it no doubt believed that the value of his property exceeded the amount of his debts by a wide margin, and would be sufficient, with proper management, to pay all his debts, without insolvency. Day himself estimated the excess of his property above his debts at above

a half million dollars. The bank could not, with more certainty than Day himself, forebode the widespread financial ruin which was impending, nor that the value would so suddenly disappear from all properties, and especially from Day's property, leaving all in a state of collapse. While the evidence was perhaps sufficient to justify, it was not sufficient to compel, a finding that Day contemplated the execution of an assignment or anticipated insolvency at the time when he executed the transfers to the bank, nor that the bank either knew, or had reasonable cause to believe, that he was insolvent at that time. The finding is not clearly against the preponderance of the evidence.

By the Court.—The order of the circuit court is affirmed.

INNES, Administratrix, Respondent, vs. CITY OF MILWAUKEE, Appellant.

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April 10 — April 30, 1897.

Injury to employee: Failure to furnish most approved appliances: Special verdict: Inconsistent findings.

1. In an action by a servant to recover for injuries alleged to have been caused by a failure to furnish him a safe place in which to work, a failure to furnish the latest and most approved appliances does not constitute negligence as matter of law, the test of liability being whether the master exercised such care in that regard as men of ordinary care and prudence observe in and about their affairs, or such care as the great mass of men observe under similar circumstances.
2. Where the only negligence relied on in an action for the killing of a boiler attendant by the bursting of an elbow in a blow-off pipe was the use of a cast-iron elbow, a finding of the special verdict that it was constructed of the materials and in the manner ordinarily and usually employed in the construction of such elbows is inconsistent with findings that there was a defect or insufficiency in it which caused it to give way and burst, and that the defendant was guilty of want of ordinary care which was the proximate cause of the accident.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

Plaintiff's intestate, Alexander Innes, was an employee of defendant, to assist in attending some steam boilers used to generate steam for power to operate its water pumps. The boilers were put in place and installed for defendant by the E. P. Allis Company, a few months before the injury hereafter mentioned. One of the necessary attachments to such boilers was a blow-off pipe used for emptying the boilers when desired. At a point in such blow-off pipe where it was subjected to the full pressure of steam in the boilers was a cast-iron bend, attached to the wrought-iron pipe by means of a thread on the pipe and in the elbow, whereby the two were screwed together. While the deceased was about his work, the steam pressure caused the bend to burst, whereby steam and hot water escaped from the boilers and so scalded the deceased as to cause his death. This action was brought by the personal representative of the deceased, to recover damages, on the theory that the cast-iron bend was insufficient, and that defendant knew it, or ought to have known of it, and that the deceased came to his death by reason of negligence on the part of the defendant in operating its steam plant with such defective bend, so located as to be liable to burst and injure those required to be in the vicinity about their work. The defendant answered, denying that the bend was insufficient, or that its bursting was attributable to any negligence on the part of the defendant, and alleged that the boilers were furnished, set up, and put in operation for the defendant by the Edward P. Allis Company; that said company was of good credit and reputation in its business, and was relied upon by defendant to adjust all the parts of the steam apparatus in a suitable manner; that the steam pipe and cast-iron bend had no discoverable defects prior to the accident, and that it was reasonably safe and serviceable for the purpose for which it was designed and used.

The jury rendered a special verdict in part as follows: "Q. Was such pipe and bend constructed of the materials and in the manner ordinarily and usually employed in the construction of such pipes and bends, at and prior to the time of the accident? A. Yes. Q. Were there at that time other and safer elbows or bends known and in general use? A. Yes. Q. If you answer the fourth interrogatory in the affirmative, were such other and safer appliances generally known to be less liable to sudden breaks and explosions? A. Yes. Q. Was there any defect or insufficiency in such pipe or bend which caused such bend to give way and burst? A. Yes. Q. If you answer the last question in the affirmative, was such defect or insufficiency so obvious and apparent that the officers and agents of the defendant city knew, or might in the exercise of ordinary care have discovered, it? A. Yes. Q. Was the defendant, the city of *Milwaukee*, or any of its officers, guilty of any want of ordinary care which was the proximate cause of the injury to the plaintiff? A. Yes. Q. Did the defendant contract for a purchase of the blow-off pipe and bend from reputable and responsible dealers in and manufacturers of such appliances? A. Yes. Q. Did the defendant contract for and purchase the blow-off pipe from Edward P. Allis Company, and were the same connected with the boiler by it under its contract with the defendant? A. Yes. Q. If you answer "Yes" to the last question, and also to the sixth question, did the defect and insufficiency in the blow-off pipe and bend, which caused the bend to give way and burst, result from the carelessness and neglect of the Edward P. Allis Company, its agents, employees, or workmen, in the first instance? A. Yes." Damages were assessed at the sum of $3,000.

Both sides moved for a judgment on the special verdict. Defendant's motion was denied, and plaintiff's granted. Judgment was thereupon entered in plaintiff's favor, from which judgment this appeal was taken, proper exceptions

having been made to present the question discussed in the opinion.

For the appellant there was a brief by *C. H. Hamilton*, city attorney, and *Max W. Nohl*, of counsel, and oral argument by *Mr. Nohl.*

For the respondent there was a brief by *Bell, Brazee & Stover*, and oral argument by *A. W. Bell.*

MARSHALL, J. The alleged negligence consisted in the use of a cast-iron bend attached to a wrought-iron pipe in the manner described in the complaint. All the evidence to establish want of ordinary care on defendant's part was directed to the question of whether such a bend was generally considered reasonably safe and was in general use for the purpose to which it was put in defendant's steam plant, at and before the time of the injury. The jury determined that question in defendant's favor, by finding that such pipe and bend were constructed of the materials and in the manner ordinarily and usually employed in the construction of such pipes and bends at and prior to the time of the accident. True, the jury also found that safer appliances were known, that the bend in question was obviously defective, and that defendant was guilty of want of ordinary care, which was the proximate cause of the injury; but the obvious defect referred to clearly goes only to the fact that the bend was of cast iron and attached to a wrought-iron pipe. It does not change the effect of the finding that the appliance was one of the kind ordinarily used, both in respect to material, construction, and adjustment. If the finding of want of ordinary care was based on the use of the cast-iron bend, which was a usual appliance and usually found safe, the two findings directly contradict each other. If it is directed to the finding that there was a safer appliance known at that time, it applied the rule that a person, in the use of machinery, must take advantage of known improvements in the direc-

tion of safety, which rule has no application whatever to the relation of master and servant. The true rule is well stated by standard text writers, to the effect that the master is not liable for the consequence of danger, but of actionable negligence. When a person is charged with such negligence, and it is shown that his conduct came up to the standard of persons generally, in the same business, under the same circumstances, neither jury nor court has a right to say that such way is a negligent way from any legal standpoint. The master cannot be held responsible for not adopting the best way. It is sufficient if he takes the ordinary way. This rule is universal in its application to the relation of master and servant, unless such ordinary way be obviously dangerous. *Guinard v. Knapp-Stout & Co. Company*, 95 Wis. 482; *Wormell v. M. C. R. Co.* 79 Me. 404; *Lehigh Coal Co. v. Hayes*, 128 Pa. St. 294; *Bradbury v. Goodwin*, 108 Ind. 286; *Iron-Ship Building Works v. Nuttall*, 119 Pa. St. 149; *Titus v. B., B. & K. R. Co.* 136 Pa. St. 618.

So, the effect of the verdict as a whole was to find both that defendant was free from actionable negligence, and was guilty of such negligence. A verdict so contradictory and inconsistent is insufficient to sustain a judgment. *Conroy v. C., St. P., M. & O. R. Co., post*, p. 243. This case is ruled by the decision in *Guinard v. Knapp-Stout & Co. Company.* It is there held in effect that a person in the conduct of his business, who furnishes an employee with a place to work as free from danger as other persons of ordinary care and caution, and engaged in like business and under like circumstances, ordinarily furnish, his duty in that regard is fully performed. It may be taken as the settled law that the test of actionable negligence, in a case where the servant seeks to recover damages for injuries alleged to have been caused by failure of duty on the part of the master in respect to furnishing such servants a reasonably safe place to work, is whether the master came up to the standard of

persons generally under similar circumstances. Did he exercise such care as men of ordinary care and prudence observe in and about their affairs, or, in other words, such care as the great mass of men observe under similar circumstances? *Dreher v. Fitchburg*, 22 Wis. 675; *Jung v. Stevens Point*, 74 Wis. 547; *Ward v. M. & St. P. R. Co.* 29 Wis. 144; *Lockwood v. Belle City St. R. Co.* 92 Wis. 97. If so, and an injury nevertheless happens, it will be without legal wrong; hence without legal redress.

Applying the foregoing to the facts of this case, it is plain that the jury acquitted the defendant of any breach of its duty to exercise ordinary care in respect to furnishing plaintiff's intestate with a reasonably safe place to work, and then followed with the inconsistent finding that defendant was guilty of a want of ordinary care in that respect. A judgment rendered on such a verdict is without any basis to support it.

Several errors are assigned in the brief of counsel for the appellant, which need not be noticed, for if errors in fact and prejudicial as well, they are not liable to occur upon another trial.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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MORAWETZ, Appellant, vs. SUN INSURANCE OFFICE, Garnishee, Respondent.

April 10 — April 30, 1897.

Garnishment of foreign corporation: Situs *of property: Debt to nonresident: Jurisdiction.*

A foreign insurance company doing business in this state cannot be garnished here by a resident of the state on account of its indebtedness to a nonresident principal defendant arising from a loss

occurring in another state, where, under subd. 11, sec. 2637, S. & B. Ann. Stats., the principal defendant could not maintain, in this state, an action upon his claim against the insurance company; and the voluntary appearance of the principal defendant in the main action does not give jurisdiction in the garnishment proceeding.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

The facts are stated in the opinion.

For the appellant there was a brief signed by *Turner, Bloodgood & Kemper*, attorneys, and *Jackson B. Kemper*, of counsel, and oral argument by *Jackson B. Kemper*. To the point that the appearance of the defendant in the principal action conferred jurisdiction upon the court and entitled it to proceed in the garnishment action, they cited *Young v. Ross*, 31 N. H. 201; *Lawrence v. Smith*, 45 id. 533; *Parks v. Adams*, 113 N. C. 473; *Reed v. Fletcher*, 24 Neb. 435.

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *George Lines*.

CASSODAY, C. J. It appears from the record, and is in effect found by the court, that February 4, 1893, the defendant, a British insurance corporation having its principal office in the United States in the city of New York, issued its policy of fire insurance to the principal defendant, Klingbeil, then residing at Alliance, Nebraska, upon his stock of general merchandise located and situated in said Alliance, for $1,200; that said property was destroyed by fire July 3, 1893; that due proof of loss under such policy was made by Klingbeil, August 7, 1893; that September 30, 1893, the garnishee papers were served on the defendant corporation's agent in Milwaukee, but the sheriff returned that Klingbeil could not be found in that county nor Wisconsin; that Klingbeil appeared in the action against him October 7, 1893; that Octo-

ber 28, 1893, judgment was entered against him therein; that October 14, 1893, Klingbeil assigned his claim against said insurance company under the policy to M. E. Smith & Co., Kilpatrick-Koch Dry Goods Company, and Groneweg & Schoentgen, who were interpleaded herein; that thereafter said loss was adjusted, and paid by said garnishee in Nebraska to the parties interpleaded herein, to whom the whole of the claims of said Klingbeil against the garnishee on account of said loss had been so assigned, upon their giving the garnishee a bond of indemnity; that the garnishee is, and was at the time mentioned, doing business in the various states in the Union as a fire insurance company, and in the state of Nebraska under the statutes of that state; that the garnishee answered, setting up some of the facts stated, and denying liability; that the plaintiff took issue with such answer; that upon the trial thereof the court found the facts stated, and as conclusions of law the court found, in effect, that Klingbeil could not have brought or maintained any action against said garnished company in any court in Wisconsin on the said cause of action by the service of process upon such corporation or any officer or agent thereof, since none of the conditions existed upon which such service is authorized by the laws of Wisconsin; that this garnishment could not be maintained; that the garnishee was entitled to judgment herein dismissing the said garnishee action, with costs and disbursements of this action, to be taxed; and that judgment was thereupon ordered to be entered accordingly. From the judgment so entered thereon the plaintiff brings this appeal.

Under the statutes of this state, a creditor is expressly authorized to proceed by garnishment against any person having "any property whatever, real or personal, in his possession or under his control belonging to such creditor's debtor." S. & B. Ann. Stats. sec. 2752. "The words 'personal property' include money, goods, chattels, things in

action and evidences of debt." R. S. sec. 4972, subd. 3. "Practically, garnishment is a seizure in the hands of the garnishee by notice to him, creating an effectual lien upon the garnished property to satisfy whatever judgment the plaintiff may recover in the suit in which it is issued." Rood, Garnishment, § 1. "So the service of garnishee papers upon the garnishee operates as an equitable levy upon such of the debtor's property and credits as were at the time of such service in the hands of the garnishee." *Winner v. Hoyt*, 68 Wis. 287; *Globe Milling Co. v. Boynton*, 87 Wis. 632; Rood, Garnishment, § 192, and cases there cited. "Jurisdiction in such cases of garnishment, where the defendant in the principal action is a nonresident, has been upheld mainly upon the ground that such proceeding is substantially *in rem* to subject specific property or credits to the payment of a specific debt." *Winner v. Hoyt*, 68 Wis. 286, 287. "Jurisdiction is the authority to hear and determine the cause, and refers to the power of the court over the parties, the *res* or property in contest, and the authority of the court to entertain the suit or proceeding, and render the judgment or decree which it assumes to make. In garnishment proceedings all the statutory prerequisites to commencement of suit are jurisdictional and must be strictly complied with." Rood, Garnishment, § 221. This court has gone further, and held that, even after jurisdiction over the *res* or property has been acquired by the service of garnishee papers upon the garnishee, yet that such jurisdiction may be devested and lost by failure to comply with the statute as to service upon the principal defendant or his attorney. S. & B. Ann. Stats. sec. 2756; *Globe Milling Co. v. Boynton, supra.* This is on the theory, often adjudicated, to the effect that "the authority to institute and prosecute garnishee proceedings is entirely statutory, and, unless the requirements of the statutes are complied with, the proceedings cannot be sustained." *McDonald v. Vinette*, 58 Wis.

619. "Property outside of the state is not the subject of garnishment under our statute." *Bates v. C., M. & St. P. R. Co.* 60 Wis. 296; *Renier v. Hurlbut*, 81 Wis. 30.

There is no pretense that the garnishee's agent in this state upon whom the garnishee papers were served, had at the time in his possession or under his control any specific property or rights of property belonging to Klingbeil. The extent of the claim is that at that time the garnishee was indebted to Klingbeil — a resident of Nebraska — on a policy of insurance upon property in that state which had been destroyed by fire, and hence that such indebtedness was attached by the service of the garnishee papers upon this foreign insurance company's agent in Milwaukee. The plaintiff in this action, by virtue of this garnishment, stepped into Klingbeil's shoes, and acquired his rights of action, but he had no better right to maintain this action in the courts of this state than Klingbeil would have had. *Healey v. Butler*, 66 Wis. 9, 16; Rood, Garnishment, § 46. Although the plaintiff was at the time a resident of this state, yet, for the purpose of maintaining this garnishee action against this foreign corporation, he must be regarded, *pro hac vice*, as a resident of Nebraska, and not of this state. But Klingbeil could not have maintained an action in any of the courts of this state against the garnishee for the cause of action stated, for the reason that our statute expressly declares that "such service can be made upon a foreign corporation only, either when it has property within the state or the cause of action arose therein, *or the cause of action exists in favor of a resident of the state.*" S. & B. Ann. Stats. sec. 2637, subd. 11; *Commercial Nat. Bank v. C., M. & St. P. R. Co.* 45 Wis. 172; *Myer v. Liverpool, L. & G. Ins. Co.* 40 Md. 595. This brings the case within the ruling of this court in *Renier v. Hurlbut*, 81 Wis. 24, except that the principal defendant did not appear in that case.

The general appearance of the principal defendant in the

main action in the case at bar did not cure the defect in the garnishment proceedings. Rood, Garnishment, § 232; *Beaupre v. Brigham*, 79 Wis. 436. It has been held by a federal court of high authority that: "A nonresident creditor cannot have his property in a debt seized in a state to which the debtor [corporation] may resort merely for the purpose of doing business through agents, when the claim arose on a contract not to be performed within the state, and the debtor does not reside therein. A debt has no *situs*, for the purpose of garnishment, in a state of which the plaintiff, defendant, and garnishee are all nonresidents, although the garnishee is a foreign corporation which, by general provisions of a state statute, is subject to garnishment in the state, because it assumes to do business there." *Reimers v. Seatco Mfg. Co.* 30 L. R. A. 364; *S. C.* 37 U. S. App. 426; *S. C.* 70 Fed. Rep. 573. To the same effect: *Caledonia Ins. Co. v. Wenar* (Tex. Civ. App.), 34 S. W. Rep. 385; *Central Trust Co. v. C.,R. & C. R. Co.* 68 Fed. Rep. 685; *Douglass v. Phenix Ins. Co.* 138 N. Y. 209.

By the Court.— The judgment of the superior court of Milwaukee county is affirmed.

SALADIN, Respondent, vs. KRAAYVANGER and wife, imp., Appellants.

April 12 — April 30, 1897.

Tenants in common: Adverse possession: Fraud in obtaining title: Laches.

1. A tenant in common in possession who has once acknowledged his cotenant's title cannot claim to hold adversely until he has brought home to his cotenant knowledge of the adverse nature of his holding, unless his exclusive use and enjoyment has been so long continued as to justify a finding of acquiescence on the part of the other tenant.

2. In an action by one tenant in common against her cotenant to set aside a sale under a foreclosure judgment through which the latter had fraudulently acquired title to the common property, it appeared, among other things, that the parties were brother and sister; that the mortgage had been given by their mother, under whom they claimed, to secure the defendant's individual debt; that to defendant's knowledge plaintiff was an ignorant woman, unfamiliar with business, very poor, deserted by her husband, and living at a great distance; that no direct notice of the foreclosure was ever brought home to the plaintiff, although some mention was made of a sale about to be made; that her name had been intentionally misspelled on the copy of the summons which had been mailed to her; and that she remained in ignorance of the sale until her return, more than ten years after the execution of the deed, when she promptly asserted her rights. *Held*, that the plaintiff was not guilty of such laches as would preclude a recovery.

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Affirmed.*

This is an action in equity to set aside a sale under a foreclosure judgment as a cloud upon title to real estate, and to have an accounting for rents and profits. The answer set up adverse possession and laches. The action was tried before a referee, whose report was confirmed by the court.

Upon the trial the following facts appeared without dispute: On the 15th of July, 1878, the eighty acres of land in question were owned by one Anna Kraayvanger, the mother of the plaintiff and of the defendant *William Kraayvanger*. Upon the date aforesaid, Anna died intestate, leaving four children, her heirs at law, including the plaintiff and the defendant aforesaid. She also owned at the time of her death forty-four acres of land in another place, with some personal property. At the time of her death the eighty acres of land aforesaid, which is in litigation, was subject to a mortgage for $639 to secure a note signed by Anna and her son *William*. At the time of Anna's death the plaintiff was living with her husband, one Casimir Saladin, in the

city of Pittsburgh, Pennsylvania, and continued to live there until she returned to Milwaukee, in November, 1893, shortly before commencing this suit. Upon the death of Anna, the defendant *William* went into possession of the eighty acres of land in question, and has remained in possession of the same up to the time of the trial of this action. In September, 1881, action was commenced to foreclose the said mortgage. The plaintiff was named as a defendant in that action under the name of "Anna Salentine," and service by mailing was made upon her under that name, but the papers never reached her. In March, 1882, judgment was taken in the foreclosure action, and in April, 1883, the premises were sold upon the judgment to the brother-in-law of the defendant *William*, who received a sheriff's deed, and paid $921.27 for the same. In September of the same year, *William* paid his brother-in-law the sum he had advanced to purchase the premises, and the brother-in-law executed a quitclaim deed running to the defendant *William* and *Mary Kraayvanger*, his wife, jointly. Since receiving this deed, *William* has claimed exclusive ownership of the premises, but never brought home notice of such claim to the plaintiff, and he has also made some improvements upon the premises. In March, 1879, *William* purchased the interests of his brother John and his sister Mina in the premises, thereby becoming the exclusive owner of an undivided three-fourths thereof. The sheriff's sale under the foreclosure judgment has never been confirmed by the court. The rental value of the one-fourth of the premises during the time the defendant *William* has been in possession thereof, up to the time of the commencement of the action, was found by the referee to amount to $1,006.85 over and above the proper offsets.

The referee further found upon conflicting evidence the following additional facts: That the entire consideration of the mortgage for $679 was received by the defendant *William*, and his mother was only an accommodation maker

of the note and mortgage; also that the plaintiff had no knowledge of the foreclosure of the mortgage until she returned to Milwaukee, in 1893; also that there was a collusive arrangement between the defendant and his brother-in-law, who purchased the mortgaged premises at the foreclosure sale, by which the brother-in-law was to nominally purchase the same in his own name, but in fact as the agent of *William*.

There was also evidence to the effect that in March, 1883, proceedings were commenced in the court of common pleas in the city of Pittsburgh by Casimir Saladin for the purpose of declaring his wife insane, and that she was adjudged insane on the 21st day of April, 1883, and her husband was appointed her guardian, and that said adjudication of insanity remained unreversed until the 15th of February, 1890, when, upon the plaintiff's petition, she was adjudged sane, and all the proceedings had in 1883 were superseded and determined; further, that during all of the time from April, 1883, until March, 1890, the plaintiff was under disability to transact business, and wholly without means of support, and had an infant daughter, who was crippled and dependent upon her for support; and that as soon as she was able to do so, to wit, in November, 1893, she returned to the city of Milwaukee, and then for the first time became aware of the foreclosure proceedings. This finding with regard to the plaintiff's insanity was based upon an exemplification of the proceedings in the Pennsylvania court. Objection was made to the reception of such exemplification in evidence because the adjudication of insanity was not made until after the date of the foreclosure judgment, but the objection was overruled.

Judgment was rendered setting aside the foreclosure proceedings, and removing the cloud from the plaintiff's title; also for the rents and profits aforesaid; and from this judgment the defendant *William* and *Mary*, his wife, have appealed.

Edwin F. J. Goldsmith, for the appellants.

For the respondent there was a brief by *Rietbrock & Halsey* and *Theo. Otjen*, and oral argument by *L. W. Halsey*.

WINSLOW, J. It is unnecessary to decide whether the exemplification of the lunacy proceedings in the Pennsylvania court was admissible or not. The finding of the plaintiff's insanity may be stricken from the case, and still the plaintiff will be entitled to recover upon the other facts found which are founded upon sufficient evidence. From these findings it appears that in 1883 the defendant *William* and the plaintiff were tenants in common of the farm, he owning three fourths and she one fourth thereof, and he being in possession of the whole, acknowledging her interest. The whole farm was subject to a mortgage for *William's* individual debt. Upon the foreclosure of that mortgage no notice of the proceedings was ever given to the plaintiff, and she remained in ignorance of them, without fault on her part, until her return to Milwaukee, in 1893. *William* procured his brother-in-law to bid in the property at the foreclosure sale for the purpose of cutting off the plaintiff's title, and then paid his brother-in-law the amount advanced, and took a deed of the premises. *William* remained in possession after the foreclosure the same as before, and gave the plaintiff no notice of any change in the character of his holding, or that he claimed any different or greater interest in the premises than before.

It is very well settled that a tenant in common in possession, who has once acknowledged his cotenant's title, cannot claim to hold adversely until he has brought home to his cotenant knowledge of the adverse nature of his holding, unless his exclusive use and enjoyment has been so long continued as to justify a finding of acquiescence on the part of the other tenants. *Sydnor v. Palmer*, 29 Wis. 226; *Stewart v. Stewart*, 83 Wis. 364. We find no such state of facts here. The defense of the statute of limitations therefore cannot

avail the defendants, nor do we think the facts show that the plaintiff was guilty of laches. The plaintiff was an ignorant woman, unfamiliar with business, living at a great distance from the scene of action, and was very poor, with a family to support, and had been deserted by her husband. All of these facts were known to *William*. While there seems to have been some mention made to her of a sale of the premises about to be made, it does not appear that she was notified that her title was in danger by foreclosure, nor did she ever receive a summons or paper of any kind in the foreclosure action. On the other hand, her name seems to have been intentionally spelled wrongly, so as to keep from her all knowledge of the foreclosure. She is not to be judged as a business man would be judged. Considering her situation and circumstances, we do not think she should be charged with laches for not anticipating that her brother would use the machinery of the law to cut off her share in her mother's estate.

These observations dispose of both of the defenses made and necessitate affirmance of the judgment.

By the Court.— Judgment affirmed.

GIANELLA, Respondent, vs. BIGELOW and others, Executors, imp., Appellants.

April 12 — April 30, 1897.

Estates of decedents: Banks and banking: Individual liability of stockholders: Jurisdiction: Equity: Parties: Constitutional law: Circuit and county courts: Judgments: Executions.

1. Upon the death of a stockholder in a bank his statutory liability for the debts of the bank under sec. 47, ch. 479, Laws of 1852 (S. & B. Ann. Stats., p. 1228), survives in respect to his estate in the hands of his personal representatives, and may be enforced, without an assignment of the stock to them on the books of the bank, to the extent of the assets received by them.

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2. The statutory liability of a stockholder for the debts of a bank under sec. 47, ch. 479, Laws of 1852 (S. & B. Ann. Stats., p. 1228), is a liability of all the stockholders to all the creditors, on the principle of copartnership, and can be enforced only by proceedings in equity, to which the bank and all its stockholders must be made parties unless it is impossible or impracticable to bring them all before the court.
3. The power of the legislature to take away the jurisdiction of the circuit court in legal or equitable actions is not absolute, but is subject to the condition that a substantial remedy must be conferred on some tribunal of competent and adequate jurisdiction. *Lannon v. Hackett*, 49 Wis. 261, limited and explained.
4. The power of county courts to enforce the statutory liability of stockholders of a bank against the estate of a deceased stockholder in the regular course of administration is inadequate since they have no authority to bring in the bank or the other stockholders whose presence is necessary to a complete determination of the liability. The jurisdiction of the circuit court over such proceedings was therefore not taken away by sec. 3845, R. S., conferring exclusive jurisdiction over the administration of estates upon the county court; nor would a recovery therein be barred because the action was commenced after the expiration of the time for the presentation of claims in the county court under sec. 3844.
5. After the amount of the claim in such a case has been established in the circuit court, no execution can be awarded on the judgment, but the judgment must be certified to the county court to the end that the claim established by it be paid as a claim against the estate in the order prescribed by law.

APPEALS from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed in part; reversed in part.*

This action was brought against the Plankinton Bank; William Plankinton and Anna B. Plankinton, trustees of the estate of John Plankinton, deceased; *Frank G. Bigelow*, *H. A. J. Upham*, and *Caroline E. James*, executors of the last will and testament of Charles J. Cary, deceased; *Hugh Ryan* and *John B. Le Saulnier*, executors of the last will and testament of William Sanderson, deceased; and others, stockholders in said bank,— by the plaintiff, for the benefit of himself and all other creditors of said bank, and

all persons to whom it was indebted on the 1st day of June, 1893, at which time it made an assignment for the benefit of creditors to the defendant William Plankinton, as assignee, and thereupon ceased to do business.

The plaintiff alleged, among other things, that at the time of said assignment the Plankinton Bank was, and still is, indebted to him in the sum of $1,009.48, except that dividends to the amount of thirty per cent. have been paid by its assignee; that the capital stock of the bank was $200,000, and at the date of the assignment was held, in different amounts, by the various defendants named therein (among others, $5,000 by *Frank G. Bigelow*, *H. A. J. Upham*, and *Caroline E. James*, as executors of the last will and testament of Charles J. Cary, deceased, and $3,000 by *Hugh Ryan* and *John B. Le Saulnier*, as executors of the last will and testament of William Sanderson, deceased); that each of said stockholders is liable, in a sum equal to his aforesaid amount of stock, for the indebtedness of said bank, under the provisions of the general banking law, and that the action is brought to enforce such liability for the benefit of the creditors of said bank; that the assets remaining in the hands of the assignee are insufficient to pay its indebtedness in full, and that full payment of the liability of the stockholders, under the provisions of the banking law aforesaid, is required for the liquidation and payment in full of the indebtedness of the bank; that the assignee has paid dividends to the amount of thirty per cent. on such indebtedness, and the assets remaining in his hands are, to a large extent, of such a character that they cannot be immediately turned into cash, so that a long time will be required for the purpose of converting them, they consisting largely of real estate and real-estate securities; that the assignment of said bank, and all proceedings under the same, are under the supervision and control of the circuit court for Milwaukee county, and all the creditors of said bank are required to

prove their claims in and under the direction of that court, and that all claims and demands against the bank have been proved and adjusted, and are now of record therein; that immediate payment of the liability by the stockholders of said bank was necessary, and should be required. The plaintiff prayed judgment that the said stockholders in said bank be required, each of them, forthwith to pay the amount of their respective liabilities as stockholders; that a receiver be appointed, authorized to collect and receive such payments, etc., and that he be authorized to make proof of claim for the same against the estates of Charles J. Cary, deceased, and of William Sanderson, deceased, if the amount due from such estates is not otherwise paid by the respective executors; that he might have such further order or judgment as might be just and proper to enforce the liability of said stockholders of said bank for the benefit of the creditors of the same; and that the moneys received and paid be distributed to them, upon their proofs of claims already filed; and for further and other relief.

The defendants *Frank G. Bigelow* and others, as executors of Charles J. Cary, deceased, demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, that the court had no jurisdiction of the persons of the said defendants, and that the court had no jurisdiction of the subject of the action. The demurrer was stricken out, and the defendants answered, admitting and denying various allegations of the complaint, and setting up certain defensive matter thereto, the substance of which will appear in the finding of the court; and the defendants *Hugh Ryan* and *John B. Le Saulnier*, executors of Sanderson, answered, in substance, in like manner.

The court at the trial found, among other things, the assignment of the Plankinton Bank to William Plankinton, as assignee, on the 1st of June, 1893, whereupon it ceased to do business, and that said assignee qualified and took charge

of the assets of the bank; the indebtedness of the bank in $1,009.48, which had been reduced, by dividends paid to the plaintiff by the assignee and receiver appointed in the action, to fifty per cent. thereof; that the capital stock was $200,000, $96,000 whereof was held by Frederick T. Day, $5,000 thereof by the defendants *Frank G. Bigelow*, *H. A. J. Upham*, and *Caroline E. James*, as executors of the last will and testament of Charles J. Cary, deceased, and $3,000 thereof by *Hugh Ryan* and *John B. Le Saulnier*, as executors of the last will and testament of William Sanderson, deceased, and various sums by other parties; that seven of said stockholders (naming them and the amount of their respective holdings) had paid to the receiver the amounts of their respective liabilities as such stockholders; that the assignee of the bank, together with the receiver in the action, had paid dividends to the amount of fifty per cent. of the claims of creditors, and fifty per cent. of said claims still remained due; that the remaining assets of the bank, exclusive of the stockholders' liability, were of such a character that they cannot within a reasonable time be converted into money, but that a long time will be required therefor, and such assets are insufficient to pay the indebtedness of the bank and the claims of said creditors, in whole, within a reasonable time; that, while it was possible that such assets might be sufficient ultimately for that purpose, it was not probable, and the payment in full of the liability of the stockholders, under the provisions of the banking law, is required for the liquidation and payment in full of the indebtedness of the bank.

It was further found that Charles J. Cary died testate, March 1, 1892, leaving a last will and testament naming *Frank G. Bigelow*, *H. A. J. Upham*, and *Caroline E. James* his executors, and owning at the time of his death fifty shares of the capital stock of said bank, of the par value of $5,000, standing in his name on the books of the bank;

that letters testamentary were issued to them by the county court of Milwaukee county on May 9, 1892, and that said executors, as such, are the holders and owners of the said capital stock; that they have never received any dividend thereon, nor voted or done any other act as such holders, except to inventory the same and cause it to be appraised; that on the 9th of May, 1892, the county court of Milwaukee county made an order, in the matter of the settlement of said estate, pursuant to the statute, requiring creditors of said Cary to present their claims against him for examination and allowance on or before the first Tuesday of December, 1892, which time was allowed and limited for that purpose, and that notice be given of the time and place at which such claims and demands would be received, examined, and adjusted; and that the notice of the time limited thereby for creditors to present their claims was duly given as provided by law, and on the 16th day of October, 1894, said county court rendered its final decision on all claims presented, and that no claim on behalf of the Plankinton Bank, or any of the creditors of said bank, or any other person, against said Charles J. Cary, on account of any liability by him as a stockholder of said bank, or otherwise, for its indebtedness, or any part thereof, was ever presented to said court or filed therein. And it was found, in like manner, that a like order in the matter of the estate of William Sanderson, deceased, who died in February, 1893, testate, was made by said county court on the 8th of March, 1893, requiring all creditors to present their claims and demands against said William Sanderson, for examination and allowance, on or before the first Tuesday of October, which was duly published, and that no claim, contingent or otherwise, had ever been filed against said estate by the plaintiff, or any other creditor of the Plankinton Bank, based upon any alleged liability of said deceased as a stockholder therein; that said *Ryan* and *Le Saulnier* had duly qualified

as executors, and entered upon the discharge of the trust, and ever since, as such executors, have been the owners of said thirty shares of the capital stock of the Plankinton Bank; that there was due and owing to the plaintiff and other creditors of the bank, from certain stockholders named, by virtue of, and under the provisions of, the banking act, the sums stated: From said *Bigelow* and others, executors of the last will and testament of Charles J. Cary, deceased, $5,000; from *Hugh Ryan* and *John B. Le Saulnier*, executors of William Sanderson, deceased, $3,000,— with interest on said several amounts from the 4th of December, 1894, and the costs of the action.

As conclusions of law, the court found that the plaintiff was entitled to the relief demanded in the complaint, in accordance with said findings; and it was adjudged, among other things, that the defendants *Bigelow* and others, executors of Charles J. Cary, deceased, out of the property and assets received by them, and in their hands as such, pay to Albert E. Fletcher, receiver in the action, for the benefit of the plaintiff and other creditors who had proved their claims, $5,000, with interest from the 4th of December, 1894, amounting to the sum of $5,479, to be collected by execution issued out of the court in the name of the plaintiff, in due form of law, to be levied, etc., from the property and assets received by his said executors and in their hands at the time of the commencement of the action, together with costs. A like judgment was given against the defendants *Hugh Ryan* and *John B. Le Saulnier*, executors of William Sanderson, deceased, for $2,287.49, to be collected by execution levied in like manner; and various other claims against stockholders were thereby established and adjudged.

The executors of Charles J. Cary appealed from the judgment so rendered against them, as did the executors of William Sanderson.

For the appellants there was a brief by *Wells, Brigham &*

Upham and *W. E. Black*, attorneys for the executors of Cary, and *Henry D. Goodwin*, attorney for the executors of Sanderson, and oral argument by *Mr. Black*.

For the respondent there was a brief by *Glenway Maxon*, attorney, and *Winkler, Flanders, Smith, Bottum & Vilas*, of counsel, and oral argument by *Mr. Maxon* and *Mr. F. C. Winkler*.

PINNEY, J. 1. The liability sought to be enforced against the stockholders of the bank in this action is founded upon sec. 47, ch. 479, Laws of 1852 (1 S. & B. Ann. Stats., p. 1228), which provides that "the stockholders of every corporation or association, organized under the provisions of this act, shall be individually responsible, to the amount of their respective share or shares for all its indebtedness and liabilities of every kind;" and by sec. 22 of the act it is provided: "The shares of such association shall be deemed personal property, and shall be transferable on the book of the association; and every person becoming a shareholder by such transfer, shall, in proportion to his shares, succeed to all the rights, and be subject to all the liabilities, of prior stockholders." It is argued that these executors are not within the liability of the statute; that they are not persons becoming shareholders by transfer of their shares to them on the books of the bank; and that they have no greater rights, and are subject to no greater liabilities, than if Cary and Sanderson each, in his lifetime, had executed to them an assignment of his stock; and that they could not become stockholders until a transfer of the stock was made to them on the books of the bank. But this action does not proceed, as against these executors, upon the theory that they became stockholders, as between them and the bank, by purchase and transfer of the shares, or that by reason of their interest in and relation to the stock, in their representative capacities, they have become subject to any personal liability. They have not assumed

or consented to any such position. The action is to charge them, in their representative capacities of executors, with the statutory liability which their respective testators in their lifetime were under, as shareholders of the Plankinton Bank, and through such executors to reach the estates of said deceased shareholders, in order to discharge the same. This liability of the shareholder does not die with him, but survives in respect to his estate in the hands of his executors or administrators. Thomp. Corp. § 3320. Upon the death of Cary and Sanderson the stock which stood in their names, respectively, on the books of the bank, was cast upon their personal representatives; and this liability remained against their respective estates, the same as any other liability or debt, to be enforced, through such personal representatives, by some court having adequate equity jurisdiction. To this end, no assignment of the stock is necessary, and their personal representatives continued the legal personality of the deceased stockholders. Lowell, Transfer of Stock, §§ 35–36. The case of *Cleveland v. Burnham*, 64 Wis. 357, in which the opinion was expressed that a transfer "on the books of the bank should be shown, upon which to found the liability," was in respect to the liability of the *purchaser* of stock, who took the same by transfer *inter vivos*, and not where it passed by bequest or operation of law. The title or interest of these executors is first for the purposes of administration, and then to execute the trusts upon which it was bequeathed to them, respectively; and they are chargeable in this action, for such liability, only to the extent of the assets severally received by them. 1 Cook, Stock (3d ed.), § 248; *Taylor v. Taylor*, L. R. 10 Eq. 477; *In re St. George Steam Packet Co., Hamer's Case*, 3 De Gex & S. 279; *Grew v. Breed*, 10 Met. 569; *Chase v. Lord*, 77 N. Y. 1; *In re Bingham*, 127 N. Y. 296.

2. The objections to the jurisdiction of the court, to the sufficiency of the complaint, and the contention that the

claims in suit against the estates of Cary and of Sanderson were barred by the statute of limitations, all rest upon the same grounds, and may be conveniently considered together. The nature of the liability of stockholders under the section of the banking law relied on, and the manner in which it must be enforced, came before this court at an early day, in a series of carefully considered cases, and the law was so fully and firmly settled that further discussion would be inappropriate and unnecessary. In *Coleman v. White*, 14 Wis. 700, which was an action at law by a single creditor against an individual stockholder to recover a debt due from the bank, the court said: "We are of the opinion that the liability is primary and absolute, and attaches the moment the debt is contracted by the bank; that it is a liability of all the stockholders, to all the creditors, on the principle of copartnership,— the stockholders standing on substantially the same footing as though they were partners, save only that the responsibility of each is limited to a sum equal to his share or shares of stock. Subject to this limitation they are answerable as original or principal debtors, and their liability more nearly resembles that of copartners than any other with which it can be compared." As to the remedy, the court said: "We are persuaded that the remedy should be by suit in equity, in which all the creditors should join, or one or more should sue for the benefit of all, and that the action should be against the bank and all the stockholders, unless it be impossible or impracticable to bring them all before the court, or some other cause for the omission be shown;" that this conclusion followed necessarily "from the nature of the obligation imposed, it being a liability on the part of all the stockholders, in proportion to the amounts of their respective shares, to all the creditors, according to the sums severally due them. It is an indebtedness which a court of law has no power to regulate and adjust, and to which the jurisdiction and powers of equity are peculiarly

and exclusively adapted." 1 Cook, Stock (3d ed.), § 222; *Arthur v. Willius*, 44 Minn. 409; *Walsh v. M., C. & N. W. R. Co.* 2 McCrary, 156; *Umsted v. Buskirk*, 17 Ohio St. 113; *Hadley v. Russell*, 40 N. H. 109; *Erickson v. Nesmith*, 46 N. H. 371. This view of the liability and remedy under this statute has been ever since strictly maintained. In *Cleveland v. Marine Bank*, 17 Wis. 545, it was held that the suit, which was framed as indicated, might be maintained without a judgment having been obtained at law against the bank. And subsequently, in *Merchants' Bank v. Chandler*, 19 Wis. 437, it was held that a judgment creditor of the bank, whether or not he had docketed his judgment and issued execution against the real estate of the bank, might maintain the action, in behalf of himself and all other creditors who may choose to become parties thereto, against the bank, jointly with the stockholders, to reach and apply its assets and enforce the liability of the stockholders. There is at this time no ground for question as to the nature of the liability, or that it can be enforced only in equity; and it is equally well settled that the bank and all its stockholders must be parties defendant, unless it is impossible or impracticable to bring them all before the court.

3. It is contended that the liability in question, upon the facts stated in the record, can be enforced only in the county court of Milwaukee county, in the regular settlement of the estates of the said deceased testators, and that as a time had been fixed in which creditors of the respective testators might present their claims against them for allowance, and notice of such limitation, and of the time of hearing proofs of claims, had been given, the circuit court was prohibited by the statute (R. S. sec. 3845) from entertaining jurisdiction of these claims. This section provides: "No action shall be commenced against an executor or administrator, excepting actions for the recovery of specific real or personal property, or actions to establish, enforce or foreclose a lien or

right of lien on real or personal property, . . . until the expiration of the time limited for the payment of debts. Nothing in this section shall prevent any person having a lawful claim against a deceased person from bringing an action therefor against the executor, administrator, heir, devisee or legatee of such deceased person, when no time has been fixed in which creditors may present their claims against the deceased for allowance, or when no notice of such limitations has been ordered or given." By sec. 3844: "Every person having a claim against a deceased person, proper to be allowed by the court or commissioners, who shall not, after notice given as required by section 3839, exhibit his claim to the court or commissioners within the time limited for that purpose, shall be forever barred from recovering such demand, or from setting off the same in any action whatever."

The relief demanded and given against these executors is for the payment of money, and it is argued that the complaint fails to state a cause of action, in that it is not alleged that no time had been fixed within which the creditors might present their claims for allowance, or that no notice of such limitation had been ordered or given, and that the judgment, therefore, is not warranted by the pleadings and findings. In *Price v. Dietrich*, 12 Wis. 626, and *Ernst v. Nau*, 63 Wis. 134, which were actions brought for the recovery of legal demands, the statutory prohibition in sec. 3845 against bringing actions against executors or administrators except in the cases therein specified was applied, and it was held that the remedy in the county court by presentation and proof of such claims is exclusive.

The case of *Lannon v. Hackett*, 49 Wis. 261, was an action brought by a surviving partner against the executor of his deceased partner, his widow, and his heirs at law, for an accounting for moneys received by the deceased partner in his lifetime, the proceeds of partnership property, to two thirds

of which the plaintiff was entitled, but no part of which had been paid to him; and judgment was sought that the executor of the deceased partner should pay the amount found due him on such accounting. The widow and heirs at law were made parties defendant only as being interested in the assets in the executor's hands, and no attempt was made to charge them personally, or to establish a lien on any real estate that had come to them. In brief, the only relief which the plaintiff asked was a judgment for the payment of money only, against the executor of the deceased partner. The cause of action was clearly for equitable relief, and it was not essential to the adjudication of the claim in the county court that any other party should be brought before it. The presence of the claimant and of the executor was sufficient to give that court jurisdiction to adjudicate the claim. After a careful examination of the powers and jurisdiction of the county and circuit courts in relation to claims against the estates of persons deceased, in view of the fact that county courts had equitable jurisdiction, it was held that the provisions of the statutes under consideration applied to equitable as well as to legal claims, and that equitable claims not presented within the time limited by statute, and proved, would in like manner be barred. It was said in that case: "The fact that the claim is one which can be enforced in a court of equity alone is no reason for proceeding in the circuit court. The county court has ample power to determine equitable as well as legal claims. The only exceptions are those expressly mentioned in the statutes, and possibly *actions to ascertain an equitable claim and then enforce it* as a lien upon specific personal property or real estate which may have come to the hands and possession of the executor or administrator as a part of the estate of the decedent." It was further said that "of the power of the legislature to take away the jurisdiction of the circuit court in actions to charge the estates of deceased persons with the payment of the debts

of the decedent, there can be no doubt;" that, "if the legislature can take away its jurisdiction as to cases at law, it can as to cases in equity." Accordingly it was held that as the plaintiff had not shown that no time had been fixed by the county court within which creditors might present their claims, or that no notice of hearing had been given, as required by statute, he had failed to show any reason for bringing his action in the circuit court, and, the subject matter of the action being within the exclusive jurisdiction of the county court, the complaint was held fatally defective, and that there could be no recovery.

It is material to observe that this decision expressly recognizes the fact that there may be implied exceptions, in addition to those specified in the statute, in respect to certain equitable causes of action, as instanced in the opinion; that the language, though very broad and general, must be taken and considered with reference to the case then before the court; and that the decision cannot be fairly held controlling upon facts or conditions not presented and evidently, therefore, not within the mind of the court. The power of the legislature to take away the jurisdiction of the circuit court in legal or equitable actions is not absolute, but is subject to the condition that a substantial remedy must be conferred on some tribunal of competent and adequate jurisdiction.

In *Hasbrouck v. Shipman*, 16 Wis. 296, the court, speaking of the power of the legislature to change, modify, or alter the laws governing proceedings in courts of justice, both in respect to past and future contracts, stated: "The rule extracted from the cases was that this power was unrestricted so long as a substantial remedy was afforded according to the course of justice as it existed at the time the contract was made. But the legislature must give some remedy, and not destroy the legal force and obligation of a contract, taking away all existing remedies." *Von Baumbach v. Bade*,

9 Wis. 559; *Morse v. Goold*, 11 N. Y. 281; *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608; *Curran v. Arkansas*, 15 How. 304.

To give this legislation the construction and effect upon which the defendants insist, would render it unconstitutional, as applied to equitable causes of action, such as are stated in the complaint, where various parties necessary to litigate and determine them cannot be cited and brought before the court. In the present case the county court had no power to cite and bring before it the bank, or its assignee, or any of its numerous stockholders, without whose presence the question of the liability of the estates of Cary and of Sanderson, or of their executors in their representative capacity, for these claims, could not be considered and determined, within the rule laid down in *Coleman v. White*, 14 Wis. 700, and other cases cited. The court certainly did not, in *Lannon v. Hackett*, 49 Wis. 261, intend, even by the broad and general language used, to hold that the jurisdiction of the circuit court in *all* equitable claims or demands was taken away by the statute, except as therein stated, but simply that such would be the result as to all claims, whether legal or equitable, that could be effectively litigated in the county court, and in respect to which its jurisdiction is complete and adequate to the ends of justice; in other words, that the provisions of secs. 3844 and 3845 apply only within the legal competency of their jurisdiction. The case of *Lannon v. Hackett* must therefore be understood accordingly. The case of *Bostwick v. Estate of Dickson*, 65 Wis. 593, was for a money demand due from the estate of Dickson by reason of an express trust, and no other parties than those already before the court wherein the claim was filed were necessary to litigate it.

The law does not require a party to do a vain thing. There is no reason for saying that a claimant is bound to present his claim to a tribunal for allowance, which has no

power to adjudicate it, or, failing to do so, that he shall be barred of his rights. Although the ordinary jurisdiction of courts of equity over administrations has been taken away and conferred on probate courts, or has become obsolete, yet there still remains an auxiliary or supplementary jurisdiction, to be exercised in exceptional cases, where the jurisdiction of the probate court is confessedly inadequate, or has been found insufficient, and "the jurisdiction over estates, interests, and primary rights, purely equitable, and to administer equitable remedies, is nowhere lost merely because the interest, right, or remedy grows out of, or is connected with, the estate of a deceased person which is in the course of administration, even though the administration proper, the accounting and final settlement, are carried on under the exclusive jurisdiction of another tribunal. In all such cases, however, the jurisdiction must, of course, be based or grounded upon some distinctive and independent ground of equitable cognizance, and its exercise may then result in a remedy which is a material aid to a pending administration, or which removes an impediment from the final settlement of the estate." 1 Pomeroy, Eq. Jur. §§ 347–351. And it is no objection to the jurisdiction that when the rights of the plaintiff shall have been determined the judgment will have to be executed by the county court in probate, in the manner directed by the statute. *Catlin v. Wheeler*, 49 Wis. 507, 520.

The jurisdiction of the circuit court in the present case may well be rested upon the inability of the county court to afford to the plaintiff any adequate remedy in the regular course of administration; and the circuit court will decline to take jurisdiction in matters arising in or relating to the administration of the estates of decedents, except where special circumstances show that a complete and adequate remedy cannot be given by the county court. *Hawley v. Tesch*, 72 Wis. 299, 304; *Meyer v. Garthwaite*, 92 Wis. 571, and previous cases there cited. The cases of *Nolan v. Hazen*, 44

Minn. 478, and *Hospes v. N. W. Mfg. & Car Co.* 48 Minn. 174, 31 Am. St. Rep. 637, were both in the district court of Minnesota, a court having the same equitable jurisdiction as the circuit court in this state; and the case of *Estate of Warren*, 52 Mich. 557, seems to proceed upon the ground that the liability there under consideration was one at law, and which might be enforced without the presence of other stockholders and parties, and does not appear to be in accord with the rule in this state. *Coleman v. White*, 14 Wis. 700. It is apparent, therefore, that the complaint is sufficient, and that the circuit court had jurisdiction of the subject matter and of the action, and that the statute bar, under sec. 3844, R. S., is not applicable to these claims.

4. It is further assigned as error that the circuit court by its judgment awarded execution against the executors of Cary and of Sanderson, to be levied upon and collected out of the property and assets received by them as such executors and in their hands at the time of the commencement of the action. The statute (sec. 3845, R. S.), in substance, provides that no attachment or execution shall be issued against the estate of the deceased, or the executor or administrator thereof, until the expiration of the time limited for the payment of debts, except in certain cases not here material to state. Whether the time limited for the payment of debts has expired, or whether an order has been made for such payment, the record does not show. We think that this statute is applicable, and that, after the amount of the claims have been established, no execution should be awarded on the judgment, but that the judgment must be certified to the county court, to the end that the claims established by it be directed to be paid as claims against the estates of these respective decedents, with other claims, in the order prescribed by law. R. S. sec. 3852. The necessity for equitable aid or relief having ceased, the powers of the county court are entirely adequate to the enforcement of the claims. If the

executions, as awarded, should be enforced, it might result in giving the claimants an unfair preference over creditors of the estate. The case is also clearly within the rule stated in *Catlin v. Wheeler*, 49 Wis. 507, 519, that, when the rights of the parties have been adjudicated and determined by the proper judgment in the case, the county court may proceed, at the instance of the plaintiff or of the executors, to execute such judgment in the manner provided by the statute.

It follows, therefore, that the judgment appealed from should be affirmed, except as to the portion awarding executions against these executors, and that as to such portion it should be reversed. No costs will be awarded on these appeals, but the fees of the clerk of this court are to be paid by the respondent.

By the Court.— Judgment is ordered accordingly.

MOODY, Respondent, vs. STREISSGUTH CLOTHING COMPANY, Appellant.

April 12 — April 30, 1897.

Master and servant: "General manager:" Discretion as to manner of performing duties: Condonation of breach of duty.

1. Where the complaint in an action to recover damages for breach of a contract of employment alleged that the defendant hired the plaintiff "as manager of its business," and the answer admitted that he "agreed to assume charge of and to manage the defendant's business and store," the plaintiff, as matter of law, was something more than a mere manager of a store, and had some discretion as to the manner of the discharge of his duties, including the time and manner of advertising, and the employment of his time; and occasional absences while actually employed in good faith in what he deemed to be the furtherance of the interests of defendant's business would afford no ground for his discharge.
2. The action of an employer in retaining an employee after knowledge of a breach of duty, with an admonition "not to let it happen again," is a condonation of the breach.

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Affirmed.*

Action for damages for breach of a contract of employment. On or about May 1, 1895, the parties to this action entered into a contract whereby it was agreed that the plaintiff should render his services to the defendant company, as manager of its business, at the city of Milwaukee, for the term of one year, for which services he was to receive a salary of $2,500. Plaintiff entered upon his employment under this contract, and so continued until October 7, 1895, when he was discharged by the defendant.

It was claimed by the defendant that among other duties of plaintiff as such business manager "was that of preparing for the public press of the city of Milwaukee, on certain days, the advertisements of the defendant company, and to close and securely lock the store of the defendant company each and every night;" that on October 4, 1895, the plaintiff failed to prepare such advertisements, and on or about the same date failed to close and lock the store. In the amended answer it was alleged that the plaintiff failed to attend to his duties, in absenting himself from the store during business hours. It seems there was no express agreement as to what should be the specific duties of the plaintiff under the contract. There is some conflict of testimony as to the manner in which plaintiff performed the duties of his employment. While it is urged that it was plaintiff's duty to close and lock the store each night, there is evidence tending to show that some others of the employees carried keys; and plaintiff testified that, though he usually attended to that duty, he did not do it all the time. There seems to have been no agreement, at the time of making the contract, that the plaintiff should prepare the advertisements for the press, but, on request of the president of the defendant company, the plaintiff had, for some time preceding his discharge, been accustomed to prepare such advertisements. He testifies

that the president of the company "supervised, corrected, and changed them to suit himself." It is not claimed that the plaintiff prepared the advertisements for October 4, 1895, and it does not appear in evidence whether or not they were prepared at all for that date. Several witnesses for the defense testified that plaintiff was absent a number of times during business hours. The absences were admitted by plaintiff, who claimed that he was absent at such times on account of the business of the defendant, except on two occasions, when he was sick, and two other occasions, when he was absent with defendant's permission. The president of the defendant company testified that plaintiff had no business to perform for the company outside of the store.

On or about January 29, 1896, plaintiff secured employment in St. Louis at a salary of $1,650 per annum. He testified to having sought employment in Milwaukee and Chicago. At the time of the trial the defendant had paid to plaintiff on the contract $398.50. Plaintiff sued for $2,101.50, the residue of the full year's salary. The jury found for plaintiff in the sum of $1,689. From a judgment on this verdict the defendant appeals.

For the appellant there were briefs by *McVicker & Kehr*, attorneys, and *Elliott & Hickox*, of counsel, and oral argument by *E. A. Kehr* and *C. T. Hickox*. To the point that the court had no right to assume judicial knowledge of the rights, powers, and duties of the plaintiff's position, they cited *Swazey v. Union Mfg. Co.* 42 Conn. 556; *Brown v. M., K. & T. R. Co.* 67 Mo. 122.

F. A. Geiger, for the respondent.

NEWMAN, J. The complaint alleges that the plaintiff hired to the defendant "as manager of its business at the city of Milwaukee." The answer admits by express averment that by the agreement the plaintiff "agreed to assume charge of and to manage the defendant's business and store in the city

of Milwaukee." The terms of the contract do not otherwise appear. So the capacity in which the plaintiff was employed was not open to controversy by evidence. He was more than the mere manager of the store.

On the trial it was sought by the defendant to limit his duties to the mere management of the store,— to something in the nature of the duties of a mere floor manager. And to show that he failed in the due performance of such duties, it was shown that on several occasions he was absent from the store during business hours. These absences the plaintiff excused by saying that he deemed them reasonable and necessary, and that they were employed about the necessary conduct and management of the defendant's business. The court, as bearing upon this contention, instructed the jury, in substance, that the plaintiff, as general manager of the defendant's business, had some discretion in the manner of the discharge of his duties and the employment of his time, and might properly be absent from the store at such times and on such occasions as, in his opinion, the interests of the defendant's business required; that his relation to the defendant and its business was not that of a mere clerk or workman. The charge is of considerable length, and not necessary to be set out *verbatim*. The general tenor is as stated. It is, no doubt, in the line of the true theory of the case, and free from substantial errors. The difficulty with the defendant's contention is that it is in conflict with its express admission in its answer. Of course, the general manager of a business must have a discretion as to the manner of its conduct and the most advantageous use of his own time. These absences from the store seem to have been the principal ground for plaintiff's discharge. If they were actually occasioned by, and employed in good faith in, what the plaintiff deemed to be the furtherance of the interests of the defendant's business, they could afford no ground for plaintiff's discharge. And so the court, in effect, charged

the jury. The testimony was sufficient to support the verdict on that contention.

On one or more occasions the plaintiff failed to lock the store when closed at night. He says he left another party to lock the store. It would seem that the general manager of a business would have power to delegate to some other servant the performance of so simple an office. Nothing in the contract made it the duty of the plaintiff in person to lock the store. But he was not discharged for this shortcoming. He was merely admonished "not to let it happen again." This was, no doubt, a condonation of the alleged fault.

It was alleged, too, that the plaintiff sometimes failed to attend properly to the advertising of the business. The time and manner of the advertising were, no doubt, at least to some extent, left to the judgment and discretion of the general manager of the business, in the absence of any contract provision or binding regulation governing the matter. It does not clearly appear that this discretion was abused. The contention was properly submitted to the jury, and the verdict on that point is supported by the evidence.

No important error is found in the record.

By the Court.—The judgment of the superior court of Milwaukee county is affirmed.

HOMESTEAD LAND COMPANY, Respondent, vs. BECKER, Receiver, imp., Appellant.

April 12—April 30, 1897.

Fixtures: Intention: Giving of chattel mortgage.

96	206
104	190
104	191
104	192
96	206
110	90
f110	93
53 LRA	608
96	206
c116	290

Where the engines, boilers, and other fixed machinery constituting the equipment of a factory and being a part of the realty had passed as such to a corporation, subject to a mortgage which it

had agreed to assume as consideration for the conveyance, the unexplained action of the corporation in taking up such mortgage and giving in lieu thereof a new note secured by mortgage of the same real estate and also by a chattel mortgage of all said fixed machinery did not operate *per se* to impress upon such property the character of personal estate, as between the mortgagee and a general creditor of the mortgagor.

APPEAL from a judgment of the circuit court for Milwaukee county: CHAS. V. BARDEEN, Judge. *Affirmed.*

The plaintiff brought this action to foreclose a mortgage for $15,684.01, on certain lots in block 11, in the continuation of Layton Park, etc., in the county of Milwaukee, upon which lots was a tack and nail factory, equipped with an engine and boiler, shafting, pulleys, and belting, and tack and nail machines, bolted to the timbers of the building, and connected with said shafting by belts; the whole being used as a factory for the manufacture of tacks and nails. The defendant *Becker*, as receiver, had obtained a judgment for $14,611.36, rendered July 21, 1893, against the Milwaukee Tack & Nail Company, the mortgagor, upon which execution had been issued and levied upon said machinery, he claiming the same to be personal property, and the plaintiff claiming the same to be a part of the real estate and covered by its mortgage. The plaintiff had loaned and advanced to the firm of Austin, Soule & Brazier, who were engaged in the manufacture of tacks and nails, large sums of money, which were used and expended in the construction and building of the tack and nail factory in question, on lots sold and afterwards conveyed by it to said company, and in the purchase of additional machines and machinery which were placed in the factory.

It was found by the court that said building was purposely constructed with strong foundations and heavy timbers, on which the floors thereof are placed, the upper floor being supported by strong posts, in order to make it suffi-

ciently firm to carry the heavy machinery to be placed in the second story of said building; that said firm and their grantee, the Austin, Soule & Barnett Company, placed in said factory all the machines and machinery in controversy, and attached the same to the ground and building, with the purpose and intention that the same, as a whole, should constitute a plant and factory for the manufacture of tacks and nails, and that such plant and factory, including machines and machinery, should be permanent fixtures and accessions to the freehold, and that the business of the manufacture of tacks and nails should be permanently established and conducted on said property; and, to that end, the boiler and engine, designed to furnish power to propel and operate said machinery, were built upon brick foundations, reaching below the first floor of said building, and several feet into the ground; that the shafting used therein is adapted to said building, and was securely fastened to the upper floors, and to the sides thereof, by iron hangers bolted to the timbers supporting the second floor and timbers constituting the sides and framework of said building; that all the machines were securely fastened to said building, by being firmly bolted to the floors thereof, and connected to the shafting by belts and pulleys, and were propelled by power furnished by said engine and boiler, through belts connected with said shafting; and that it was the purpose and intent of said firm, and their grantee, the Austin, Soule & Barnett Company, to make said machines and machinery, and the whole thereof, a permanent annexation to the freehold, to be used as aforesaid.

It was further found that said Austin, Soule & Brazier, being indebted to the plaintiff for said moneys, and for the price of said lots, in the sum of $15,684.01, executed their promissory note for that sum, payable May 18, 1894, together with a mortgage upon the lots described, securing the same, which was duly recorded May 22, 1889; that on the 14th of Janu-

ary, 1891, they organized a corporation under the laws of the state, called the Austin, Soule & Barnett Company, for the purpose of manufacturing tacks and nails in said factory, and conveyed said premises to said corporation, the real consideration for which was the assumption by said company of said indebtedness then due from the said firm to the plaintiff; that subsequently said mortgage was released, and, in place thereof, the said corporation, on the 14th of January, 1891, executed its promissory note for the mortgage debt to the plaintiff, together with a mortgage on said lots and premises constituting the factory, etc., which was recorded February 11, 1891, which is the mortgage being foreclosed, and, at the same time, executed and delivered to the plaintiff its certain chattel mortgage, securing the same debt, in which is described not only certain personal property, consisting of tools used by the laborers, etc., but also all the fixed machines and machinery, including the engine and boiler in said factory, which chattel mortgage was filed July 27, 1893; that the name of said corporation was afterwards changed to the "Milwaukee Tack & Nail Company," and it purchased and placed in said factory, covered by said mortgage, twelve additional tack or nail machines, which were firmly bolted to the floors of said building, and connected with the said shafting therein by belts and pulleys, and propelled by power furnished by said engine and boiler, the same as the other tack and nail machines already therein, which were intended to be permanent additions to its factory, to be used in the business thereof; that afterwards, and in the month of August, 1893, the defendant *Becker*, as receiver of the Wisconsin Marine & Fire Insurance Company Bank, having obtained judgment, issued execution thereon, and levied the same as already stated.

There was evidence to the effect that the machines varied in weight from 150 to 2,000 or 2,500 pounds, a majority of them weighing from 300 to 500 pounds. They were bolted

to the floor, by bolts with nuts on them, so they could be, and were, moved from place to place in the building, by taking out the screws and detaching them from the shafting, and putting them in another place and connecting them with the shafting.

The court held that the property thus levied on had become and was a part of the real estate, and was subject to the plaintiff's mortgage, and it was adjudged accordingly, from which the defendant *Becker*, as receiver, etc., appealed.

For the appellant there was a brief by *Miller, Noyes, Miller & Wahl*, and oral argument by *B. K. Miller, Jr.* They contended, *inter alia*, that the parties had elected to treat the machinery as personal estate. *Smith v. Waggoner*, 50 Wis. 155; *Second Nat. Bank v. O. E. Merrill Co.* 69 id. 501; *Walker v. Grand Rapids Flouring Mill Co.* 70 id. 92; *Sword v. Low*, 122 Ill. 487; *Myrick v. Bill*, 3 Dak. 284. A recital that property is personal estate estops the parties from saying it is real. *Ballou v. Jones*, 37 Ill. 95; *McFadden v. Allen*, 134 N. Y. 489; *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381; *Binkley v. Forkner*, 117 id. 176; *Morey v. Hoyt*, 62 Conn. 542; *Tyson v. Post*, 108 N. Y. 217.

For the respondent there was a brief by *Fish & Cary*, and oral argument by *R. N. McMynn*.

PINNEY, J. In *Taylor v. Collins*, 51 Wis. 123, the following rules or tests are approved for determining whether articles of machinery are fixtures: "(1) Actual physical annexation to the realty; (2) application or adaptation to the use or purpose to which the realty is devoted; (3) an intention on the part of the person making the annexation to make a permanent accession to the freehold." The matter of intention of the parties is held to be the principal consideration.

The machinery, etc., in dispute was annexed to the realty by the original mortgagors, the grantors of the judgment debtor, and it was subsequently seized as personal property

on the execution against the defendant the tack company, in favor of the defendant *Becker*, receiver, etc. There was an actual physical annexation of the property to the realty. It was applicable and adapted to the use and purpose to which the realty was devoted. It was clearly intended to be an accession or addition to the freehold, unless it can be maintained that its character was determined to be that of personal estate by the subsequent execution and delivery of a chattel mortgage thereof by the corporation, mortgagor in the real-estate mortgage, to the plaintiff, at the time the latter was executed and delivered. The lots had been sold to the parties who erected the factory by the plaintiff, and it had loaned them the money with which to erect it, furnish machinery, and put the factory in operation. The property was conveyed, when completed, to these parties by the plaintiff, and they mortgaged it to it, to secure the debt for the lots and money loaned. Subsequently, they organized as a corporation, to which the premises were conveyed by them, in consideration that the corporation would assume the payment of the mortgage debt to the plaintiff. Up to this time nothing had occurred, so far as shown, to indicate any other intention than that the machinery, etc., should be regarded as a part of the realty, to which it had been annexed and to the use of which it was particularly adapted. Under the operation of the general rule, as between mortgagor and mortgagee, no intention of removing it having been shown, the machinery, etc., passed by the mortgage to the plaintiff of the freehold, and had so passed to the mortgagors by the previous deed of the premises to them from the plaintiff; and this although it was capable of being removed without injury to the building. *Frankland v. Moulton*, 5 Wis. 1; *Voorhees v. McGinnis*, 48 N. Y. 278; *Pierce v. George*, 108 Mass. 78.

Subsequently, on January 24, 1891, the corporation now the tack company executed and delivered to the plaintiff its

note for the amount of the plaintiff's mortgage debt, and a mortgage securing the same on the same premises, the plaintiff discharging its former mortgage. At the same time, the corporation executed and delivered to the plaintiff a chattel mortgage to secure the payment of such new note, upon all the fixed machines and machinery, including the engine and boiler in the factory, etc.; and the plaintiff filed this mortgage July 27, 1893, after judgment had been entered against the corporation, the tack company. No explanation or reason is shown why the chattel mortgage was given, beyond the inference that may fairly arise that the parties intended to make the plaintiff's lien on the factory, machinery, etc., safe and certain, beyond any doubt or question. Certainly nothing appears indicating that the parties contemplated or intended a severance or removal of this machinery from the factory. The execution of the chattel mortgage, therefore, is not sufficient *per se* to change the character of the machinery, which it had already acquired, and raise a presumption of an intention to restore the character which it had formerly possessed as personalty before it was placed in the factory; and it is very doubtful whether the chattel mortgage ever became operative at all. *Kendall Mfg. Co. v. Rundle*, 78 Wis. 150–158. These views are also sustained by the following cases: *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163; *Meagher v. Hayes*, 152 Mass. 228; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Strickland v. Parker*, 54 Me. 265; *Winslow v. Merchants' Ins. Co.* 4 Met. 306. The cases cited by the appellant fail to show that, under the facts stated, the execution of the chattel mortgage would operate, by estoppel or otherwise, to convert the machinery, etc., that had previously been annexed to and made a part of the freehold, into personal estate, so that the mortgage of the freehold would fail or cease to bind it. The lien of the plaintiff's mortgage covered all that had become realty before or at the time it was executed, and all subsequent acces-

sions to the realty, unless, by a valid agreement to which it was a party, the character of personal estate was impressed thereon. *McFadden v. Allen*, 134 N. Y. 489. The contemporaneous execution to the plaintiff of the chattel mortgage to secure the same debt did not *per se* operate to impress upon such property the character of personal estate.

The judgment of the circuit court, that the machinery, etc., was subject to the plaintiff's mortgage on the real estate, was correct.

By the Court.—The judgment of the circuit court is affirmed.

MATHWIG, Respondent, vs. MANN, Appellant, and BETH HAMIDROSCH HAGODOL CONGREGATION and others, Respondents. [96 213 | 103 287]

April 13—April 30, 1897.

Mechanics' liens: Mortgages: Priority: Recording act.

1. One having a mechanic's lien upon a building is not a "purchaser in good faith," etc., within the meaning of sec. 2241, R. S., providing that an unrecorded conveyance shall be void as against a subsequent purchaser in good faith and for a valuable consideration whose conveyance is first duly recorded.
2. A mechanic's lien which, by sec. 3314, S. & B. Ann. Stats., is prior to any lien originating subsequent to the commencement of the construction of the building, is not prior to a mortgage executed before, but not recorded until after, such construction was commenced.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

The facts are fully stated in the opinion.

For the appellant there were briefs by *Timlin & Glicksman*, and oral argument by *Nathan Glicksman*. To the point that the mortgage was the prior lien even though not re-

corded until after the mechanics' liens had attached, they cited *Rose v. Munie*, 4 Cal. 173; *Miller v. Stoddard*, 50 Minn. 272; *S. C.* 54 id. 486; *Fletcher v. Kelly*, 88 Iowa, 475; *Nashua Trust Co. v. W. S. Edwards Mfg. Co.* 68 N. W. Rep. 587.

For the respondents there was a brief signed by *Nath. Pereles & Sons*, attorneys for *Biersack* and another, *Fiebing & Killilea*, attorneys for *Mathwig* and others, *Julius E. Roehr*, attorney for the *Kellers*, and *Edwin F. J. Goldsmith*, of counsel; and the cause was argued orally by *Mr. Goldsmith*. They contended, *inter alia*, that the respondents, by commencing the erection of the building before the recording of the mortgage, thereby acquired priority over it. *Chapman v. Wadleigh*, 33 Wis. 267; *Rees v. Ludington*, 13 id. 276; *Wisconsin Planing Mill Co. v. Schuda*, 72 id. 283; *Vilas v. McDonough Mfg. Co.* 91 Wis. 607.

Cassoday, C. J. This action was commenced November 11, 1893, to enforce liens for labor performed and materials furnished by the plaintiff and the defendants—other than the defendant *Mann* and the church corporation—in the aggregate amount of $3,747.05, and to have such liens adjudged prior and superior to the mortgages in favor of the defendant *Mann*. *Mann* answered, and, in effect, denied that his mortgages were subsequent and subordinate to such other liens, and claimed that they were prior and superior thereto.

Upon the trial before J. F. Harper, as referee, he found, as matters of fact, in effect, that the defendant *Beth Hamidrosch Hagodol Congregation* was at all the times mentioned a religious corporation, and on and prior to May 13, 1893, was the owner in fee simple of the lot described, being less than an acre, subject to an existing mortgage thereon of $3,000; that at that time there were situated on said premises two dwelling houses and several sheds and outbuildings; that, for the purpose of building a house of worship thereon,

the members of the congregation, at a meeting called for that purpose, May 13, 1893, by a resolution adopted, authorized its trustees to borrow of the defendant *David S. Mann*, for the purpose of building its proposed temple, $12,000 for the term of five years, and thereby authorized its president, secretary, and trustees to execute, sign, and deliver to *Mann*, in behalf of the corporation, as securities for the payment of said $12,000 and interest, two notes and two mortgages of $6,000 each; that May 17, 1893, the corporation, by its president, secretary, and trustees, in pursuance of such resolution, made and executed its two promissory notes, each bearing date on that day, in and by which the corporation promised to pay to the order of *David S. Mann* the sum of $6,000 five years after date, with interest as therein stated; that May 17, 1893, the corporation, by the same officers, in pursuance of such resolution, signed and executed, each under its corporate seal, two mortgages, each on said premises, to secure said notes, respectively; that said notes and mortgages so executed, signed, witnessed, and acknowledged were, at Milwaukee, May 17, 1893, delivered by said corporation to said *Mann*, who then and there accepted the same, and said *Mann* then and there, in consideration of the same, advanced, loaned, and passed to the credit of said corporation the whole sum of $12,000; that by an arrangement by and between the corporation and one Weil, acting as agent for *Mann*, it was agreed that said sum of $12,000 should be held by Weil for the benefit of, and subject to the order of, the corporation, and should be paid out upon the demand of the corporation, as such corporation might order; that upon the order of the corporation there was paid out of said $12,000 the sum of $3,010 to the holder and owner of the previously existing mortgage on said premises, in full payment of the principal sum thereof and interest thereupon, and said previously existing mortgage was satisfied and canceled of record; that the corporation employed *Keller & Son*

to remove the two dwelling houses situated on the premises, and to do certain work of remodeling, repairing, and refitting said dwelling houses when they should be so removed, and that such work was commenced May 18, 1893, *and not before;* that the corporation engaged the plaintiff and the several other defendants for the performance of certain work and labor, and the furnishing of certain materials, in and about the erection and construction of the church building on said real estate, which work and labor were performed and which materials were furnished as therein stated; that the construction and erection of said church building was commenced May 19, 1893, *and not before*, and no work was done in or about the erection or construction of said church building upon said real estate before May 19, 1893; that all of said sum of $12,000 was, upon the order of the corporation, paid by Weil to the contractors, laborers, and material men for work and labor performed and materials furnished in and about the removing, remodeling, and repairing of said two dwelling houses on said real estate, and in and about the erection and construction of said church building on said real estate, except $258.65 and the sum of $3,010 so paid in discharge of the previously existing mortgage thereon; that said two mortgages were each duly recorded May 20, 1893; that *Mann* is still the lawful holder and owner of said notes and mortgages, and no part thereof has been paid, except the interest accruing on and before May 17, 1895; that *Keller & Son* had a lien thereon for $1,847.42, commencing May 18, 1893; that the plaintiff had a lien thereon for $437.94, commencing May 24, 1893; that the defendant *William Grether* had a lien thereon for $803.77, commencing May 19, 1893; that the defendants *Biersach & Niedermeyer* had a lien thereon for $354.52, commencing May 19, 1893; that the defendant *Charles H. Koehler* had a lien thereon for $303.40, commencing May 24, 1893.

And as conclusions of law the referee found that said sev-

eral liens for labor and materials attached May 18, 19, and 24, 1893, as found; that said mortgages became and constituted a lien upon said real estate, and attached thereto as such lien, May 17, 1893, and became at such time a lien thereupon to the amount of $12,000 and the interest subsequently accruing thereon; that such liens of said mortgages originated from the time of their execution and delivery, May 17, 1893, and originated and took entire effect as a lien upon said real estate before the commencement of the work of removing, remodeling, and repairing said dwelling houses, and before the commencement, erection, or construction of said church building, and constituted a lien upon said real estate prior and superior to any and all of the liens for work or labor done or materials furnished, adjudged therein to the parties to this action.

The trial court ordered that the findings of fact made and reported by the referee be, and the same thereby were, confirmed and adopted as the findings of the court herein, and that each and all of the exceptions thereto be overruled; but the court differed with the referee only in the conclusions of law upon the findings of fact reported by him. The court was of the opinion that, as to the mechanic's lien claims, the lien of the mortgages attached to the real estate May 20, 1893, when the mortgages were recorded, instead of attaching thereto on the day of their delivery, and modified the conclusions of the referee accordingly, and ordered that such mechanics' liens be adjudged prior and superior to the liens of said mortgages; and that in all other respects said conclusions of law reported by said referee be, and the same thereby were, confirmed. Judgment was ordered to be entered thereon accordingly. From those portions of the judgment so entered thereon which are adverse to the defendant *David S. Mann*, he brings this appeal.

There is no question but that the mortgages were both properly executed and delivered by the corporation to the

appellant *Mann*, May 17, 1893. They were conveyances, within the meaning of the statutes, and had the effect of conveying "the land therein described, together with all the rights, privileges and appurtenances thereunto belonging, in pledge to the mortgagee, his heirs, assigns and legal representatives, for the payment of the indebtedness therein" and thereby secured. R. S. secs. 2203, 2209, 2242. The only effect of such failure of *Mann* to record his mortgages for three days after they were executed and delivered to him was the liability of having the same become "void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance" should first be duly recorded. R. S. sec. 2241. Manifestly, none of the parties here claiming liens for labor performed and materials furnished are subsequent purchasers in good faith and for a valuable consideration, within the meaning of this statute. *Butler v. Bank of Mazeppa*, 94 Wis. 351. The statute giving the liens to such laborers and material men is very plain, and cannot well be misunderstood. It is to the effect that such lien claimants shall have a lien upon such building, and upon the interest of the owner thereof in and to the land upon which the same is situated, and "such lien shall be prior to any other lien which originates *subsequent to the commencement of the construction*" of such building. S. & B. Ann. Stats. sec. 3314. The mortgages in question were both executed and delivered, and the money for the repayment of which they were given to secure, and the whole thereof, was actually advanced *prior* to the commencement of the construction of the church building, and hence the liens for such labor and materials were necessarily subject to the liens of the mortgages. The language of the statute giving such liens will admit of no other construction, and the authorities on the subject are to the same effect. *Rees v. Ludington*, 13 Wis. 276; *Jessup v. Stone*, 13 Wis. 466; *Wis. Planing Mill Co. v. Schuda*, 72

Wis. 277. A learned author on such liens says: "Recording is not necessary to give the mortgage priority of such lien under recording acts which make the recording necessary only as against subsequent purchasers and mortgagees. Thus, where a mechanic's lien attaches to property by the commencement of work upon the premises after the execution of a mortgage, but before the recording of it, the mortgage is superior, by virtue of the prior execution." 2 Jones, Liens (2d ed.), § 1460. This language is applicable to our statutes. The judgment, under our statute, is only upon "the interest of the owner in the premises *at the time* of the commencement of the construction . . . of the building." S. & B. Ann. Stats. sec. 3324.

By the Court.— The portions of the judgment of the circuit court which *Mann* appeals from are reversed, and the cause is remanded for further proceedings in accordance with this opinion.

KEEFE, Appellant, vs. FURLONG, Assignee, Respondent.

April 13 — April 30, 1897.

Fixtures: Conversion into personalty: Lease.

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By a written contract the stockholders of a corporation owning a candy factory agreed to separate the business from the real estate, and in pursuance thereof the real estate was conveyed to one of them, who, at the same time, executed a lease to the others reciting that it was expressly understood and agreed by the respective parties that the machinery in the building "belongs to the said lessees absolutely, with the full privilege of removal." *Held*, that the machinery which would otherwise have been a part of the realty was thereby, as between the parties, converted into personal property, and conveyed to the lessees as such.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is an action in equity to enjoin the removal of certain machinery from a building owned by plaintiff in the city of Milwaukee, on the ground that the machinery and other articles in question are fixtures. The machinery in question consists, among other things, of certain candy furnaces and stoves, steam coils, shafting and pulleys, shelving and counters, one steam engine and two steam boilers connecting therewith; also, a water meter. The building in question had been used as a candy and cracker factory for a number of years.

The action was tried before a referee, who found the facts substantially as follows: On the 22d of July, 1890, a corporation known as the Milwaukee Cracker & Candy Company owned the brick building and premises upon which the machinery is situated, the stockholders in said company being *John C. Keefe*, Charles E. Sammond, and W. R. Stephens. On the said 22d of July said stockholders agreed in writing to separate the business from the real estate, and to convey the building to *John C. Keefe*, in consideration of his transferring his stock to the other stockholders and assuming a portion of the debts of the company. This agreement was carried out July 29th following, on which day said company deeded to *Keefe* the said real estate, and *Keefe* leased the same to Sammond and Stephens; said lease containing the following provision: "It being expressly understood and agreed by the respective parties hereto that all personal property, *and the machinery in said building, and the machinery in the cracker ovens, belongs to the said lessees absolutely, with the full privilege of removal.*"

It further appears by the findings that Sammond and Stephens transferred all the said property and their rights under the said lease to the candy company with the knowledge and consent of *Keefe;* that said candy company made a voluntary assignment of all its property to one Roddis in December, 1892, and that the inventory of said assigned

property contained all the articles in question, except certain partitions; that in January, 1893, Roddis, as assignee, sold all of said articles and machinery to one Johnston, with the knowledge of *Keefe*, and that on the 27th of February, 1893, Johnston sold the same to the Johnston-Furlong Company, together with the good will of the business; that the last-mentioned company carried on the same business on the same premises as tenant of *Keefe* until March 11, 1895, when they made a voluntary assignment to the defendant *Furlong* of all their property, including the articles in question; that said assignee took possession of all the assets, made a new arrangement with *Keefe* for the use of the real estate, and remained in possession thereof until the month of August, 1895, when he sold the machinery and other articles in question in this suit at public auction, and while he was in rightful possession of the premises.

The referee further found that none of the articles were so attached to the freehold that they could not be easily severed without material injury to the same, and that they were all, including the water meter, used and placed upon the premises for the purposes of the business carried on by the various companies.

The referee further found, as conclusion of law, that all of the articles were, as between the parties to this action, personal property, and were removable, and that the defendant, as assignee, had the right to sever and sell the same. These findings were confirmed by the court, and judgment dismissing the complaint was rendered, from which plaintiff appealed.

For the appellant there was a brief by *Keefe & Brand*, and oral argument by *John C. Keefe*.

F. C. Eschweiler, for the respondent.

WINSLOW, J. There is really but one question in this case, and that is whether the machinery in question was a part of

the realty, as between the parties to the action. The principle is well settled that parties may treat as personal property machinery which would otherwise be part of the realty, and thus convert it into personal property as between themselves. *Smith v. Waggoner*, 50 Wis. 155; *Fitzgerald v. Anderson*, 81 Wis. 342. It seems very clear that this is just what has been done here. By the agreement of division of property, and the lease executed by *Keefe* and Sammond and Stephens in July, 1890, all of the machinery in question was treated as personalty, and in fact conveyed as such to Sammond and Stephens. The defendant here traces title to such property directly from Sammond and Stephens. He was rightfully in possession when this action was commenced, and had a perfect right to sell and remove the articles in question.

By the Court.— Judgment affirmed.

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FRANEY, Respondent, vs. WARNER and others, imp., Appellants.

April 13 — April 30, 1897.

Corporations: Stock subscriptions: False representations of promoters: Rescission: Restoring consideration: Accounting for profits: Equity: Practice.

1. A written instrument by which the signers "subscribe to the amount set opposite of our [their] respective names in a corporation to be formed" for the purchase of certain land at a specified price, is not a contract between the signers to join in buying the land, but is a mere proposal to take stock, not binding on anybody until accepted by the corporation. When so accepted the subscribers become liable to the corporation to pay for stock to the amount set opposite their names respectively, and the contract cannot thereafter be rescinded for any fraud for which the corporation was not liable.

2. In an action by one of such subscribers against the corporation to which the land had been conveyed and certain other stockholders who had been its promoters, to rescind the contract and recover the amount paid on the stock on the ground that plaintiff's subscription had been obtained by false representations as to the ownership of the land and the purchase price to be paid, a determination by the trial court acquitting the corporation of all wrong and dismissing the action as to it, left the contract of subscription in full force. A judgment, therefore, which in effect rescinded the contract as to the promoters and awarded a recovery from them of the entire amount paid thereon, was erroneous both because the money had been paid to the corporation on the contract of subscription made with it, and because the plaintiff could not restore the defendants to their former position.
3. An assignment to defendants of plaintiff's stock which they had never owned would not so restore them to their former position as to warrant a rescission.
4. If a person in good faith brings an action in equity alleging facts sufficient to constitute a good cause of action within some recognized principle of equity jurisprudence, but fails to establish some fact essential thereto, yet does establish a state of facts entitling him to some relief by way of damages or otherwise, the court will not dismiss the bill and thereby render further litigation necessary, but will retain it and render such judgment as will do complete justice between the parties.
5. Where a person has been induced to subscribe for stock in a corporation to be formed to purchase a certain tract of land by false representations of the promoters that the land was to be purchased of a third person at a certain price, when such promoters had already actually purchased the land at a much less price, he may maintain an action in equity against the promoters for an accounting and a recovery of his proportionate share of the profits retained by them.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

Action to rescind a transaction whereby plaintiff was induced by fraudulent representations made by defendants *Warner*, *Warner*, and *Wambold* to join with them in the formation of a corporation to purchase certain land for $45,000, said defendants pretending that said land was to be bought of an outside party, who was the owner, and that all who

united in the scheme would share in proportion to their respective subscriptions in the actual cost of the land and the profits of the enterprise, when in fact such defendants had obtained the right to purchase the property for $32,727, and secretly purposed making the difference between that and the selling price to the corporation of $45,000.

The complaint contained allegations to the effect of the foregoing, and that the scheme was consummated by the formation of the corporation, said defendants procuring the transfer of the land to it by an outside party, one Siegert, ostensibly at the purchase price of $45,000, but at an actual cost to said defendants of $32,727, they dividing the difference between themselves as profits, without the knowledge of plaintiff and others similarly situated.

The action was commenced against the promoters, *Warner*, *Warner*, and *Wambold*, and the corporation as well, and proper allegations made in the complaint to charge the latter as a party to the fraud. The relief prayed for was a rescission of the whole transaction, and a judgment against the defendants for the money paid by plaintiff upon the subscription to the stock of the corporation. The defendants demurred generally to the complaint. The demurrer was stricken out as frivolous, and defendants excepted. Thereafter answers were put in, and the issues thus formed tried and determined by findings and conclusions of law in substance as follows:

(1) That January 1, 1892, defendants *Warner*, *Warner*, and *Wambold* formed a fraudulent combination to cheat plaintiff and others by selling to a corporation, of which said defendants were promoters, certain lands for $45,000, which they had secretly obtained the right to purchase for $32,727; and that in furtherance of their fraudulent scheme they represented to plaintiff and others, who, with him, were induced to unite in the enterprise, that the cost price of the land was $45,000, when in fact it was $32,727.

(2) That plaintiff, relying upon such representations, and not otherwise, by a $3,000 subscription united with such defendants and others, who in the aggregate made up the entire subscription of $45,000 called for, the subscribers agreeing to take interests in the enterprise of purchasing the land corresponding to their respective subscriptions, such interests to be evidenced by stock in the proposed corporation; and that plaintiff became, by signing the agreement, an actual subscriber to the stock of the corporation to the extent of $3,000.

(3) That after the corporation was organized certificates of stock to the whole amount were issued, and payment made therefor by plaintiff and those similarly situated, as required by the plan of organization, plaintiff paying on his $3,000 of stock, $1,120; that $7,200 of full-paid stock was issued to the said defendants *Warner*, *Warner*, and *Wambold* without any consideration being paid therefor.

(4) That after the corporation was organized the said promoters, pretending that Siegert owned the land, caused themselves to be appointed by the corporation, at a meeting of stockholders, a committee to purchase the same from said Siegert for $45,000, upon the pretense on the part of said defendants, relied upon by plaintiff and others similarly situated, that he owned the land, and that such was his price; that in furtherance of the scheme said defendants caused Siegert to convey the land to the corporation by a deed expressing as the consideration one dollar and other valuable considerations, and represented that the true consideration was $45,000, part cash and part mortgage back on the premises, when in fact it was but $32,727, of which one third was paid down out of the corporation funds paid in by the *bona fide* stockholders, and the balance covered by a mortgage back to Siegert; and that the balance of the funds of the corporation paid in by such *bona fide* stockholders, aggregating in all $23,700, was kept by said defend-

ants *Warner*, *Warner*, and *Wambold* as profits, without the knowledge of plaintiff or others similarly situated.

(5) That before the commencement of this action plaintiff notified defendants that he elected to rescind the contract to purchase the land and to take stock in the corporation, on the ground of fraud, and demanded a return of the $1,120 paid to the corporation, with interest thereon; also a return to plaintiff of his contract of subscription; and that he offered at the same time to turn over to defendants his certificates of stock; and that his demands were refused.

(6) That the corporation, though a proper party, in no way participated in the fraud upon plaintiff, or is responsible therefor.

Upon such facts the court concluded: (1) That *Warner*, *Warner*, and *Wambold* were promoters of the corporation, and its agents in the purchase of the land, and occupied such relation to it that they had no right to make any profit out of the purchase of the land, and that all profits made by them in such purchase were in breach of the trust, and contrary to equity. (2) That the plaintiff is entitled to judgment rescinding the suscription to the purchase of the land and to the stock of the corporation upon reassigning to the promoters the certificates of stock in the corporation, and depositing the same with the clerk of the court for such promoters; and that plaintiff is entitled to judgment against said defendants *Warner*, *Warner*, and *Wambold* for the money paid to the corporation, $1,120, and interest thereon from the time it was so paid, with costs and disbursements; and that the defendant corporation is entitled to a dismissal of the action as to it, with costs.

Exceptions were duly filed on behalf of defendants *Warner*, *Warner*, and *Wambold*, and they, after rendition of the judgment, appealed therefrom to this court.

Orren T. Williams, for the appellants.

For the respondent there was a brief by *N. S. Murphey*,

attorney, and *H. K. Curtis*, of counsel, and oral argument by *Mr. Murphey*.

MARSHALL, J. It is assigned, first, as error that the court erred in holding that the complaint states a cause of action. This is based on the theory of counsel for appellants that respondent's counsel purposed stating a cause of action to redress a wrong to the corporation, and that necessary allegations are wanting to justify the plaintiff, as a stockholder, in prosecuting such an action, in that there are no allegations to the effect that the corporation or its officers were requested to prosecute for the wrong and that they refused to comply therewith, or that such a request, if made, would have been useless. That such allegations are requisite to such an action does not admit of question. *Doud v. W., P. & S. R. Co.* 65 Wis. 108; *Palmer v. Hawes*, 73 Wis. 46; *Eschweiler v. Stowell*, 78 Wis. 316; Pomeroy, Eq. Jur. § 1095. But that principle clearly does not apply to this case. Appellants' counsel misconceived the character of the action. It was not intended by the complaint to state a cause of action in favor of plaintiff and others similarly situated to redress a wrong to the corporation caused by the fraudulent acts of *Warner*, *Warner*, and *Wambold*, but to state a purely personal cause of action in equity against them and the corporation, as parties jointly liable for fraudulent representations and conduct, whereby plaintiff was induced to subscribe for $3,000, par value, of the stock of the defendant corporation. The theory was that the fraudulent scheme was entered into by *Warner*, *Warner*, and *Wambold*, and was carried out to the knowledge of the officers of the corporation in such a way as to render it a guilty party thereto; hence that plaintiff had his election to remain a stockholder and sue at law for damages, or to tender back what he received and sue in equity for a rescission of the contract of subscription to the capital stock and the agreement men-

tioned in the complaint, and for a return of the money paid on such subscription. He chose the latter, and no claim is made by appellants but that the complaint states a cause of action for such recission, and none can be seriously made.

The court, after properly holding that the complaint states a cause of action in equity for a rescission of the contract whereby plaintiff incurred the obligation to pay $3,000 for stock in the corporation, and paid thereon $1,120, proceeded to determine the rights of the parties in such a way that we cannot understand definitely upon what theory the judicial mind acted, consistent with any known rules of law or equity.

Many exceptions were taken by appellants to the findings of fact, but, in so far as such findings determine facts, properly so called, we are unable to say that there is not sufficient evidence to support them; therefore, they cannot be disturbed.

It is, in effect, determined that the stockholders of the company, at a regular meeting, in ignorance of the contemplated fraud of *Warner*, *Warner*, and *Wambold*, authorized them to purchase the land from Siegert for $45,000, in accordance with the plan of the promoters, upon which plaintiff's subscription was secured by such promoters; that thereafter such purchase was consummated, the land being transferred to the corporation ostensibly at a cost of $45,000, when in fact the cost of the property to such promoters was but $32,727; that they realized the difference as profits, without the knowledge of stockholders of the corporation other than themselves; that the corporation was not connected with the fraud in any way, hence not liable, and was entitled to have the complaint dismissed as to it, but without costs.

If the corporation was in no way connected with the fraud, yet was brought into court charged as a guilty party, it is difficult to perceive why the complaint was dismissed as to it without costs; but that question is not here. Refer-

ence is made to it only in the course of a necessary statement of the condition of the record in our efforts to determine upon what theory the judgment appealed from was rendered. Having found that the corporation was in no way connected with the fraud, the learned trial judge, by the first conclusion of law, determined that *Warner*, *Warner*, and *Wambold* were promoters of the corporation, and its agents, and that they acquired, as profits in the transaction, the difference between the cost of the land to them and what they turned the same over to the corporation for, in violation of their trust relations as such agents and promoters. In this the court appears to have drifted to the idea of appellants' counsel that the action was one to redress a wrong to the corporation. It, in effect, acquits the corporation of all wrong, yet such conclusion is followed by another to the effect that plaintiff is entitled to have his subscription to purchase the land, and *his subscription to the stock of the corporation as well*, rescinded, and to recover of *Warner*, *Warner*, and *Wambold* the $1,120, which, by the sixth finding of fact, the court determined was paid to the corporation on the contract of subscription to stock made with such corporation. By these facts we meet with the novel situation that the corporation is held free from fault, and the action as to it is dismissed, leaving the $1,120 it received of plaintiff as its rightful property; yet there is an apparent attempt by the judgment to rescind the contract of subscription for the stock, so as to wipe out any further liability of plaintiff thereon. Defendants *Warner*, *Warner*, and *Wambold* are required to return the $1,120, which they never received, with interest, to plaintiff; the latter having delivered the certificate of stock into court, reassigned to them, as the finding states. This language is obviously used on the theory that the money was paid to *Warner*, *Warner*, and *Wambold*, and the stock received from them. Plaintiff could not be said to have reassigned the stock to them unless it was previously assigned to plaintiff.

It is, as said before, difficult to perceive, consistent with any known rules of law or equity, upon what theory the trial court proceeded; but the legal effect of the judgment, acquitting the corporation of all wrong and dismissing the action as to it, leaves the contract of subscription to the stock, between plaintiff and the corporation, in full force, notwithstanding the language of the judgment rescinding such subscription. The judgment of rescission of the subscription can have no greater effect upon the corporation, in view of the fact that the action against it was dismissed, than as if the corporation had not been joined as a party at all. To hold otherwise would render the judgment so conflicting as to be void for uncertainty. Plaintiff has not appealed from the judgment in favor of the corporation on the cause of action set out in the complaint. That part of the judgment is in force as to all parties. The contract of subscription to the stock is binding on plaintiff, and the corporation is the lawful owner of the $1,120 paid thereon, and of the claim against plaintiff for the unpaid portion thereof. Upon what theory, then, can the judgment of rescission and for a recovery against *Warner*, *Warner*, and *Wambold* for a return of the $1,120, which they never had, upon a reassignment of stock to them, which was not received from them, stand? This question is one upon which neither counsel for appellants nor respondent have furnished the court any light.

The construction which the court gave to the paper signed by respondent, whereby he originally became a party to the scheme to form a corporation to purchase the property, may furnish some explanation of what followed. Such paper, omitting the description of the land, is in the following words: "We, the undersigned, hereby subscribe to the amount set opposite of our respective names in a corporation to be formed and known as the Wauwatosa Park Co., for the purchase and selling of the following property, . . . for the sum of forty-five thousand dollars ($45,000), and

agree to pay for the same as follows, to wit: Thirty-three and one-third per cent. (33⅓%) of the amount subscribed in cash, or more, within thirty (30) days from the date of subscription; the balance within five (5) years from said date; the deferred payments bearing interest at the rate of six per cent. (6%), payable semi-annually." By the third finding of fact, so called, which was excepted to by appellants, the court construed such paper as a contract, binding the parties thereto to join in the purchase of the land at $45,000, and a subscription to the stock of the corporation. The judgment, in terms, rescinds the obligation which plaintiff incurred by signing this paper upon the theory that it was a contract between plaintiff and the other *bona fide* stockholders and *Warner*, *Warner*, and *Wambold* to buy the land, which plaintiff was induced to sign by the fraudulent representations of the appellants, and by means of which he parted with the $1,120. Upon no other theory can we see any ground whatever for the judgment against appellants for the return of the $1,120 as upon the rescission of a contract made with them. The trouble with such theory is that it proceeds on a misconstruction of the instrument. Such instrument was a mere proposal by the signers thereof to take stock in a corporation to be formed for the purpose of buying the land. By signing it, plaintiff did not contract to join with appellants as individuals to buy the land, nor did he thereby subscribe to stock or become a stockholder in the corporation in any sense. It was a proposal not binding upon anybody until accepted by the corporation. When it was presented to the corporation, and accepted by it, each of the subscribers thereto became a stockholder therein, and became liable to pay for stock to the amount indicated opposite his name in the subscription paper. The contract of subscription made by such proposal and such acceptance could not thereafter be rescinded for any fraud for which the corporation was not liable. The character of such a

subscription paper was recently discussed and determined in this court in *Badger Paper Co. v. Rose*, 95 Wis. 145, where many authorities on the subject are cited.

It follows from the foregoing that it was error to hold that plaintiff could recover of the appellants on the rescission of a contract made with a third person, the corporation.

But if the contract of subscription, so called, contained in the paper referred to, could be considered a contract with appellants to buy the land, and if it were true that the $1,120 was paid to them (two very necessary elements for a recovery on a rescission in equity), it must yet be borne in mind that such an action will not lie unless the defrauded party is in a condition to restore the person charged with the fraud to his former situation. *Potter v. Taggart*, 54 Wis. 395; *Churchill v. Price*, 44 Wis. 540. The interest in the land which plaintiff acquired, if any, was conveyed to the corporation, and thereby placed beyond the control of respondent; hence it was impossible for him to restore such interest to appellants. Therefore, necessarily, his cause of action to rescind the contract and recover back his money, if it ever existed, is gone.

Looking at the case in the most favorable light for respondent, *Getty v. Devlin*, 54 N. Y. 403, 70 N. Y. 504, appears to touch it at every point, and unfavorably to appellants. The facts there were that four persons had acquired some oil lands at an expenditure of not to exceed $30,000. They combined to form a corporation for the purpose of selling such lands thereto for $126,000. In furtherance of such scheme they prepared and sent out a subscription paper, signed by each of them, for $5,000, worded as follows: "We, the undersigned, do hereby subscribe and agree to pay forthwith the amount set opposite our names for the purchase of property in Washington, Monroe, and Athens counties, Ohio, as per memorandum annexed, . . . at the sum of $126,000; payments to be made to Daniel Devlin, Esq., at

Broadway Bank, trustee for the purchasers, in whose name the title to the property shall be taken; said property to be put into an association for development upon such terms as these subscribers may elect after this subscription is complete." None of the promoters of the scheme intended to pay anything upon their subscriptions. They let several persons into their secret, including some relatives, from whom they obtained other fictitious subscriptions, and obtained *bona fide* subscribers for the balance of the stock; the amount being $64,500. Such *bona fide* subscribers became parties to the transaction without knowledge that the promoters owned or controlled the land, and upon the faith of the representations contained in the paper, and made otherwise by the promoters, that all the subscribers were to stand equally. They did not know that such promoters were the real sellers, and purposed turning the property over to the corporation at a large profit to themselves. Such *bona fide* subscribers paid their money to Devlin in accordance with the subscription paper. The title was thereafter taken as provided in such paper. The corporation was organized and stocked at $1,000,000, and, in order to have such stock fully paid, the property was conveyed to the corporation, and the entire stock delivered in payment thereof. The stock was thereafter, except $20,000 retained for working capital, divided between all the subscribers, fictitious and *bona fide* as well, in proportion to their respective subscriptions. The promoters of this scheme obtained their stock without paying anything therefor, and divided among themselves upwards of $30,000 as profits. On discovery of the facts, several of the defrauded stockholders tendered to Devlin, the trustee, the stock they had received, and demanded back their money, which was refused, and thereupon they brought an action to rescind the contract whereby they joined in the scheme for the purchase of the land, and for a recovery from the promoters of the money which they had paid.

The case so presented was much stronger in support of a recovery than the one before us, because the action was brought against the persons from whom the stock was received, and to whom the money was paid. The court held that the action of the promoters in inducing others to join with them in the purchase of the land upon the pretense that all were to share in such purchase at the original cost, without disclosing their ownership, and the fact that they purposed making a large profit in the transaction, was a fraud upon all subscribers who were ignorant of the facts. The court reached the conclusion without difficulty that plaintiffs were entitled to relief against the promoters in some form, but not to a rescission of the contract of subscription, and a return of all the money plaintiffs had advanced, for the obvious reason that they were not in a situation to return to the promoters the interest in the land such subscription represented. Such interest had been transferred to the corporation by the promoters, and a delivery of the stock to the latter did not restore such interest as they possessed it before the transfer. EARL, J., speaking for the court, said: "Plaintiffs could not recover back all the money paid by them, because they could not restore the promoters to the position they were in before the transfer of the real estate to the company." True, the facts were that the real estate had been lost to the corporation, so that a tender of the stock did not carry with it, even indirectly, any interest in the land; but, in our opinion, the fact that the corporation had parted with the land made no difference. Whether it had or had not, the transfer of the stock to the promoters could not restore them to their former position. The cause was reversed, and on the second appeal (70 N. Y. 504) the court held the action maintainable in equity for an accounting of the profits received by the promoters, and a recovery by the plaintiffs of their share of such profits. On both appeals, but most distinctly on the

first, the court held also that each of the stockholders might have maintained an action at law to recover of the promoters the increased cost of his stock growing out of the profits made by such promoters.

The doctrine of the case, which we approve, may be stated as follows: If a person invites others to join with him in the purchase of property at a given price, falsely representing that the purchase is to be made of a third person, and that all are to share equally in the cost and equally in the benefits of the enterprise, and such others join with such person on the faith of such representations, and the purchase is made accordingly, each of the *bona fide* purchasers paying his portion of the money, and such person acquires secretly a profit to himself by reason of having obtained the property after the making of the mutual agreement at a much less sum than the price to his associates, or by reason of having acquired the property at a much less sum before such sale, it is a fraud upon such others, and each may, by restoring such person to his original situation, rescind the contract and recover back his money in an action at law; or he may offer to restore, and, by keeping such offer good, sue in equity for a rescission of the contract and for a recovery of his money; or, without restoring, he, or all similarly interested joining, may sue in equity to charge such person as a trustee of the profits fraudulently retained by him, and for an accounting; or each may sue such person at law for damages for the fraud to the extent of the enhanced value he paid by reason thereof. A person so circumstanced stands in a relation of trust and confidence to all his *bona fide* associates, and holds all profits secretly made for the common benefit of all engaged in the common enterprise, in proportion to their respective interests. A violation of his duty in that regard constitutes actionable fraud, and such is the case whether the purchase be made before or after the agreement for the mutual enterprise.

Such is the settled law by the great weight of authority. Cases cited, where a person sells his own property to a company in which he is interested at an increased price, fairly and openly, free from representations that he is selling the property of another, have no application to this case. *Bergeron v. Miles*, 88 Wis. 397; *Whitney v. Fairbanks*, 54 Fed. Rep. 985; *Bentley v. Craven*, 18 Beav. 75; *Teachout v. Van Hoesen*, 76 Iowa, 113; *Brewster v. Hatch*, 122 N. Y. 349; *Whigham's Appeal*, 63 Pa. St. 194; *Simons v. Vulcan O. & M. Co.* 61 Pa. St. 202; *Paddock v. Fletcher*, 42 Vt. 389; *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345.

It is evident from what has preceded that there was no contract between respondent and appellants other than the mutual arrangement that they should take stock in the corporation to be formed to buy the land. It was error to adjudge a rescission of it: First. Because respondent was not in a position to restore the appellants to their former position. An assignment of stock to them which they never owned did not accomplish such restoration. Second. Because the money was paid by respondent, not on the mutual agreement to take stock, made with appellants, but on the contract of subscription to the capital stock of the corporation, made with it.

It follows from the conclusions reached that the judgment must be reversed, though not that plaintiff is not entitled to any relief, on the facts found and facts disclosed by the evidence, for the wrong done him. In our opinion, the complaint states a cause of action in equity for an accounting, and a recovery of profits retained by the promoters, which in justice and equity belong to plaintiff, and that the allegations in that regard are fully covered by the findings of fact. Such was the determination of the court in *Getty v. Devlin, supra*, and is supported by *Brewster v. Hatch, supra; Petrie v. Torrent*, 88 Mich. 43; Pomeroy, Eq. Jur. §§ 910, 912; *Hill v. Lane*, L. R. 11 Eq. 215. Says Mr. Justice RAPALLO,

in effect, on the second appeal in *Getty v. Devlin*, *supra*, there can be no doubt of the liability of parties so circumstanced to account to their associates for the profits made by them, nor that such an accounting is a proper subject for cognizance of a court of equity.

In our opinion, plaintiff is entitled to recover in this action upon another principle, well established in equity jurisprudence, and broadly applied where the distinction between courts of equity and courts of law has been abolished, as in this state. Such principle is that, if a person in good faith brings an action in equity, alleging facts sufficient to constitute a good cause of action within some recognized principle of equity jurisprudence, but fails to establish some fact essential thereto, yet does establish a state of facts entitling him to some relief by way of damages or otherwise, the court will not dismiss the bill, and thereby render further litigation necessary, but will retain it and render such judgment as will do complete justice between the parties. *Hall v. Delaplaine*, 5 Wis. 206; *Tenney v. State Bank*, 20 Wis. 152; *Kelley v. Sheldon*, 8 Wis. 258; *Combs v. Scott*, 76 Wis. 662; *Cole v. Getzinger*, *post*, p. 559; *Wyckoff v. Victor S. M. Co.* 43 Mich. 309.

The court found that the appellants made out of the scheme a clear profit of $12,272. Such profits obviously consisted largely of full paid stock, but which, under the circumstances, should be accounted for at its par value in money, though without interest up to the time of the commencement of the action; and the cash profits should be accounted for without interest as well, inasmuch as plaintiff paid only a little over one third upon his stock, and is not liable for interest on the balance until in default on calls. On that basis, on a just and true accounting, plaintiff, as owner of one fifteenth of the stock, is entitled to one fifteenth of the profits, or $851.47, with interest at the rate of six per cent. per annum from the time of the commencement of this ac-

tion; and, if damages are assessed on the theory that, though plaintiff cannot have judgment rescinding the contract and for a recovery of the money paid, he is entitled, under the circumstances, to have his damages assessed, and recover the same in this action, instead of being sent out of court to sue therefor at law, the result is the same.

By the Court.—The judgment of the circuit court as to the appellants is reversed, and the cause remanded with directions to enter judgment in accordance with this opinion.

The rescission of a subscription to stock for fraud or misrepresentation is the subject of a note to *Fear v. Bartlett* (81 Md. 435) in 33 L. R. A. 721.—REP.

MALONEY, Respondent, vs. WARNER and others, Appellants.

April 13 — April 30, 1897.

Franey v. Warner, ante, p. 222, followed.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

Orren T. Williams, for the appellants.

For the respondent there was a brief by *N. S. Murphey,* attorney, and *H. K. Curtis,* of counsel, and oral argument by *Mr. Murphey.*

MARSHALL, J. The questions presented in this case are identical with those presented and decided at this term in *Franey v. Warner, ante,* p. 222. The amount of stock subscribed for was $500; hence the plaintiff's share of the profits made and fraudulently retained by the appellants was $141.91, which sum plaintiff should have judgment for on the facts found. The judgment rendered against appellants for the full amount of money paid by plaintiff upon his stock

was erroneous, for the reasons stated in *Franey v. Warner*, *supra*.

By the Court.—The judgment of the circuit court as to the appellants is reversed, and the cause remanded with directions to render judgment in accordance with this opinion.

WINTERFIELD, Appellant, vs. CREAM CITY BREWING COMPANY, imp., Respondent.

96 239
103 132
96 239
108 560

Pleading: Evasive denials: Execution of written instrument: Guaranty: Corporations: Seal: Ultra vires.

96 239
115 581

1. Where a complaint alleged the due execution by a brewing corporation of a written instrument guaranteeing payment of the rent of an hotel, an answer which set up the affirmative defense that it had been released from liability, expressly admitted that the defendant's secretary *signed* the instrument, and denied information sufficient to form a belief as to the other allegations of the complaint, is *held* insufficient to raise the question of the due execution of the contract of guaranty by the corporation.
2. The use of a corporate seal is unnecessary except where the use of a seal would be required from an individual.
3. It was not *ultra vires* for a brewing corporation to guarantee payment of the rent of an hotel, the bar fixtures and furniture of which it owned and in which its beer was to be sold.

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. *Reversed.*

Action was commenced by plaintiff against one Joseph Scheer, as principal, and the *Cream City Brewing Company*, as surety, for unpaid rent upon what is known as the Hotel Eagle, in the city of Milwaukee. The cause was tried by a referee. The referee found that plaintiff had leased the hotel in question to Scheer for the term of three years at an agreed rental of $120 per month, payable monthly in advance; that the defendant company gave a written guar-

anty for the payment of such rent; that the purpose of the guaranty was to provide a place for the sale of defendant's beer; that at expiration of the lease there was due and unpaid seven months' rent, amounting to $840; that prior to this action the plaintiff had not released the defendant company from its liability as guarantor; that plaintiff is entitled to judgment against defendants Joseph Scheer and the *Cream City Brewing Company* for $840, with interest and costs of the action. The defendant company filed exceptions to the findings of the referee. The court gave judgment against the defendant Joseph Scheer, as demanded in the complaint. The report of the referee, so far as it affected the defendant company, was set aside, and judgment was rendered dismissing the complaint as to said company, with costs. From this judgment the appeal is taken.

For the appellant there was a brief by *Granger & Son*, and oral argument by *S. W. Granger*.

For the respondent the cause was submitted on the brief of *Fiebing & Killilea*. To the point that the contract of guaranty was *ultra vires*, they cited *Filon v. Miller Brewing Co.* 15 N. Y. Supp. 57; *Culver v. Reno Real Estate Co.* 91 Pa. St. 376; *Twiss v. Guaranty L. Asso.* 87 Iowa, 733; *Davis v. O. C. R. Co.* 131 Mass. 258; *Lucas v. White Line Transfer Co.* 70 Iowa, 541; *Janesville Bridge Co. v. Stoughton*, 1 Pin. 672, and cases cited; *Stockton v. Central R. Co.* 17 L. R. A. 97; *Famous S. & C. Co. v. Eagle Iron Works*, 51 Mo. App. 66; *Blanding v. D., I. & D. R. Co.* 88 Iowa, 225; *Madison, W. & M. P. R. Co. v. W. & P. P. R. Co.* 7 Wis. 72; *Germantown F. M. Ins. Co. v. Dhein*, 43 id. 425; *Luthe v. Farmers' Mut. F. Ins. Co.* 55 id. 546; *Nichols v. Palmer*, 48 id. 110, 112.

NEWMAN, J. Some question is made whether the due execution of a contract of guaranty by the defendant the *Cream City Brewing Company* is sufficiently proved. This question

is entirely irrelevant, as the issue made by the pleadings involved no such question. The complaint alleges that the defendant the *Cream City Brewing Company*, by an instrument in writing duly executed, did agree with the plaintiff "that, if default should be made by the said Joseph Scheer in the payment of any of the aforesaid rent which he . . . promised to pay in said lease, . . . that it, the said *Cream City Brewing Company*, would pay to this plaintiff such sum or sums of money as would be sufficient to make up any deficiency and fully satisfy all the conditions of said lease, and without any notice of such default, or prior demand being made." The allegation seems to be sufficiently comprehensive for the purpose. The answer does not deny that such an agreement was made, but sets up the affirmative defense that defendant had been released by the plaintiff from every liability arising from such agreement. It further expressly admits that the defendant's secretary *signed* such an instrument. And, as to the other allegations of the complaint, it denies having knowledge or information sufficient to form a belief. The denial is inconsistent both with the affirmative defense and with the specific admission. If it was intended as a denial of the execution of the alleged contract of guaranty, it was evasive and nugatory. For that is a matter which is conclusively presumed to be within the knowledge of the defendant. And a denial in this form does not require the plaintiff to make proof on the subject. *Mills v. Jefferson*, 20 Wis. 54; *Sweet v. Davis*, 90 Wis. 409. The secretary who signed the contract and who verified the answer knew all the facts relevant to its due execution.

Some point was made that the corporate seal was not attached to the contract of guaranty. That was unimportant. Corporations are bound by contracts made by their agents, though not under seal, and on implied contracts. The use of the corporate seal is unnecessary, except where the use of a seal would be required from an individual. 4 Am. &

Eng. Ency. of Law, 242; 2 Kent, Comm. 291; *Ford v. Hill*, 92 Wis. 188.

It is urged that to make such a contract of guaranty was not within the power of the corporation,— that the contract was *ultra vires*. The rule, no doubt, is that a corporation cannot bind itself to purposes which are foreign to those for which it was created. While this is true, the general rule, no doubt, is that, except as restrained by law, corporations have the implied power to make all such contracts as will further the objects of their creation, and their dealings in this regard may be like those of an individual seeking to accomplish the same ends. 4 Am. & Eng. Ency. of Law, 245. They are not limited in law to the use of such means as are *usual* or *necessary* to the objects contemplated by their organization, but, where not restricted by law, may choose such means as are *convenient* and *adapted to the end*, though they be neither the *usual* means, nor absolutely *necessary*. *Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co.* 5 Wis. 173; *Clark v. Farrington*, 11 Wis. 306–322; *North Hudson Mut. B. & L. Asso. v. First Nat. Bank*, 79 Wis. 31. If the contract is within the general scope of the powers and purposes of the corporation, it will not be void, even if, in some particulars, it is in excess of those powers, unless, by reason of such excess, it is against public policy. *Germantown F. M. Ins. Co. v. Dhein*, 43 Wis. 420. The purpose of the defendant's organization was to manufacture and sell beer. Doubtless it was competent to make any contract, which was convenient and adapted to further that purpose, which was not against public policy. No doubt, it was within its competency to rent a place for the sale of its beer by its agents or servants. To rent a place where one of its customers should retail its beer would seem, in a similar manner, to further the purpose of its incorporation. At least, it is not clearly foreign to that purpose. The defendant owned the bar fixtures and furni-

ture which was used by Scheer in the business. It was the defendant's beer which was sold there. The whole purpose was a scheme to make a market for the defendant's beer. The defendant patronized and promoted other similar establishments, in a similar way, in aid of the same general purpose. The scheme was germane to the purpose of the corporation, and not foreign to it. It was not *ultra vires.*

The defendant failed entirely to show any conduct upon the part of the plaintiff which could operate to release it from the obligation of its guaranty. No change had been made in the terms of the lease, nor anything done to affect the strict terms of the obligation of the guaranty.

The report of the referee was right, both upon the facts and the law, and should have been confirmed as made. The judgment of the superior court is wrong, both upon the facts and the law. It must be reversed.

By the Court.— The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded with direction to confirm the report of the referee and to give judgment for the plaintiff according to its terms.

CONROY, Respondent, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

February 6 — May 21, 1897.

96 243
96 174
96 243
f104 602
96 243
108 324
108 593
96 243
110 s362
96 243
114 t43
s38 LRA 419
57 LRA 890n

Railroads: Injuries to passenger viewing wreck: Explosion of oil tank: Contributory negligence: Inconsistent special verdict: Setting aside findings: Judgment: Appeal.

1. A passenger on a railway train which has been stopped by burning tanks of oil on the track, who, from mere motives of curiosity and pleasure, leaves a place designated as a temporary station at a safe distance from the fire, and goes within eighty-five feet of the fire, and remains there for some time, thereby exposing himself to ob-

vious danger, is guilty of such contributory negligence as will prevent a recovery for injuries caused by an explosion of one of the tanks.

2. Findings of the special verdict in such a case that if plaintiff had remained at the temporary station he would not have been seriously injured; that he unnecessarily and from motives of curiosity and pleasure approached much nearer the burning cars; and that his injuries were caused by reason of his so going nearer thereto,—are *held* to be inconsistent with other findings that the defendant in the exercise of ordinary prudence should have known of the plaintiff's position in time to warn him of the danger from the burning car; that it ought to have anticipated that plaintiff would go nearer the car and thus incur such danger; that the warning given plaintiff was negligently and insufficiently given; that plaintiff was not guilty of contributory negligence; that defendant did not exercise reasonable care and prudence in designating a place where plaintiff might take the train; and that its officers and agents were guilty of negligence which was the proximate cause of plaintiff's injuries. No judgment should therefore have been given upon the verdict.

3. The relation of carrier and passenger is *held* not to have ceased to exist, although the actual transit had been interrupted for the time being by the wreck on the track and plaintiff had voluntarily left the temporary station, to which he had been transferred to await another train, for the purpose of obtaining a nearer view of the wreck.

4. The danger of an explosion of the burning tank of oil was not hidden or concealed so as to render the railroad company liable for injuries occasioned thereby to an adult who had approached the wreck from motives of curiosity, without an invitation, express or implied.

5. The railroad company and its agents were not bound to restrain by physical force a passenger of ordinary intelligence in order to keep him out of such a danger, which was as obvious to him as to them.

6. The railroad company in such case was bound to the exercise of only ordinary care and prudence to protect the plaintiff from danger, in view of the situation and existing circumstances. It was therefore erroneous to instruct the jury "that it is the duty of the carrier to exercise extraordinary vigilance, aided by the highest skill, and to exercise the highest degree of care, to prevent the interposition of any obstacle to expose the plaintiff to danger while waiting for the train to arrive:" and the error was not cured by a subsequent correct statement of the degree of care required.

7. The objection that certain findings of a special verdict should have been set aside as contrary to the undisputed evidence, and judgment given on the other findings and such evidence, is not available on appeal unless a motion to that effect was first made in the trial court.

APPEAL from a judgment of the circuit court for Pierce county: E. B. BUNDY, Circuit Judge. *Reversed.*

This action was brought for the recovery of damages sustained by the plaintiff while a passenger on its easterly bound train of cars from Ellsworth to Marshfield, Wisconsin, by reason of the alleged negligence of the defendant.

A part of the western bound freight train of the defendant, consisting of a car load of coke, three metal tanks, two of which were filled with naphtha, and one with kerosene oil, and the caboose in the rear, had been separated from the rest of the train, and had been wrecked early in the morning, and the said cars were on fire and in a dangerous condition on the defendant's track between said places, about three miles east of the station called Roberts, and west of Hammond. The defendant carried the plaintiff on its passenger train to Roberts, where the fact that such wreck had occurred was made known to the plaintiff and other passengers. When the passenger train arrived within about 400 feet of the wreck, the passengers were directed to retain their places in the cars until such time as a train might arrive to carry them on their journey, and to which they would be transferred on the east side of the wreck. The forward tank, containing naphtha, exploded soon after the wreck, and everything in the rear of it, as well as the coke car in front, caught fire. This was quite a violent explosion, and portions of the tank were thrown a considerable distance, and the tank containing naphtha next to it was so broken as to permit much of the contents to run out. The kerosene tank in the rear was thus set on fire, and continued to burn from that time until nearly 11 o'clock, a considerable part

of the time with great violence, and producing a loud, roaring noise, with flames shooting up. A wrecking train and car had arrived at about 8 o'clock in the morning, and were operating upon the wreck, and had hitched to the tank of kerosene oil, and attempted to draw it out, scatter the burning coke, and thus clear up the track. Attempts to remove it opened the seams in the tank, and it began to burn more violently.

The wreck occurred in a farming country, and the right of way was 100 feet wide, extending through cultivated fields on either side. A gap was opened in the right of way fence on the south side, 257 feet west of the tank, and another in the wire fence, running through the fields at right angles with the road, at a point ninety-five feet south of the right of way, but 147 feet from the burning tank, and the third gap was opened in the right of way fence 256 feet east of the burning tank, in order to transfer the baggage, express matter, and mails. Efforts were unavailing to keep the passengers in the cars. A large number of them had got out, and thereupon it was concluded to transfer them, through the gaps, around the wreck, to a point east of the east gap, where they were to take the other train, and they were transferred accordingly, as well as the baggage, mail, and express matter; the latter being deposited about opposite the east gap, and the passengers occupied, in groups, a considerable space east from the east gap, along the right of way, for a distance of over 100 feet. The plaintiff, with other passengers, walked around said wreck, through said gaps, to the place where the eastern gap was opened, and said mail matter, baggage, etc., had been deposited, to wait for a train to continue his journey.

The injury complained of occurred about an hour after the passenger train arrived at the scene of the wreck, and when the plaintiff had approached to, and was standing, about eighty-five feet east of the burning tank, or one third

of the distance from said tank to where the east gap had been opened. The plaintiff was standing at said place for about half or three quarters of an hour before the explosion occurred; having left the eastern gap and walked westward towards the burning oil tank. At the time of the explosion the flame from the burning tank ascended about 100 feet or more, and, as one witness said, there was nothing but fire in the sky. Just before the explosion the flames were burning quite high,—from three to five feet,—right in the middle of the tank, and kept rising and going down. The plaintiff received his injuries from the burning oil, cast on him by the explosion.

It was contended by the plaintiff that the defendant was guilty of negligence in not warning him of the danger to which he was exposed by said burning wreck, and in not providing a safe place, and in designating an unsafe one, for the plaintiff and other passengers to wait for the train designated to carry them eastward, and in not warning the plaintiff of the danger to which he was exposed at the place he was waiting, and in allowing him to leave said train and go to said place and there remain, and in allowing said train wreck to be and remain in a dangerous and unsafe condition. The defendant denied all allegations of negligence, and alleged and gave evidence tending to show that, by its officers and agents, it directed the plaintiff and other passengers to a place at the east gap, and eastward thereof, designated as a temporary station, to wait for the train to carry them eastward, which was a sufficient distance from the wreck to insure safety from any injury on account thereof, or the subsequent explosion. The plaintiff, in his complaint, alleged that the defendant directed the plaintiff to go around said wreck to a point east and south thereof, and he accordingly walked around the same to a point on defendant's right of way, designed by the defendant as a temporary station, to wait for said train to carry said passengers eastward.

A special verdict was taken. By this it was found, among other things, in substance, that the plaintiff understood that he was to wait with the other passengers at or near the east gap for the train to carry him on his journey; that, after passing "around through the gaps to a point at or near the east gap, the plaintiff *unnecessarily, and from motives of curiosity and pleasure*, went from there to a place much nearer the burning tank," but not "for the purpose of boarding the outgoing train or supposing that was the proper place to do so," and "that the plaintiff's injuries *were caused* by his so going nearer the burning tank," and that he "would not have been seriously injured *if he had remained at or near the east gap;*" further, that "a reasonable and prudent man, under the circumstances, situate as the plaintiff was and with his means of knowledge, would not have anticipated that there was danger of an explosion of the burning oil tank, or that it might explode, and that there was danger in being so near it when he was injured;" that he "was not guilty of any want of ordinary care that contributed to his injury," but that "the defendant's officers and agents, by the exercise of ordinary care and prudence, would have anticipated that the explosion might occur;" that they "did not exercise reasonable care and prudence in designating a safe place where the plaintiff and other passengers were to take the train east;" that they "were guilty of negligence, which was the proximate cause of the plaintiff's injuries, and did not give the plaintiff any warning whatever with respect to the danger to which he was exposed by virtue of the burning tank;" and, among other things, that "the defendant's officers, in the exercise of reasonable care, ought to have anticipated the plaintiff would leave the east gap, or near there, *and go back nearer to the tank, and thus incur unnecessary danger;* that the defendant, its officers or agents, knew, or, in the exercise of ordinary prudence should have known, of the plaintiff's position in time to warn him *of the danger*

which threatened on account of the burning tank." The jury found the plaintiff's damages at $2,500.

The defendant moved for judgment on the verdict in its favor, which was denied. It then moved to set aside the verdict and for a new trial on the grounds, among others, of error in the charge to the jury and in refusing instructions requested by the defendant's counsel, and that the verdict was adverse to, and not sustained by, the evidence; but the motion was denied, and judgment entered thereon against the defendant, from which it appealed.

L. K. Luse, attorney, and *Thomas Wilson*, of counsel, for the appellant, argued, among other things, that the relation of carrier and passenger was severed by the plaintiff's voluntary departure from the temporary station. *State v. Grand Trunk R. Co.* 58 Me. 176; *De Kay v. C., M. & St. P. R. Co.* 41 Minn. 178; *Finnegan v. C., St. P., M. & O. R. Co.* 48 id. 378; *Johnson v. B. & M. R. Co.* 125 Mass. 75; *Comm. v. B. & M. R. Co.* 129 id. 500; *Dodge v. Boston & B. S. S. Co.* 148 id. 207; *Toomey v. L., B. & S. C. R. Co.* 3 C. B. (N. S.), 146; *Siner v. G. W. R. Co.* L. R. 3 Exch. 150; *S. C.* L. R. 4 Exch. 117; *Bridges v. North London R. Co.* L. R. 6 Q. B. 377; *Railway Co. v. Cox*, 60 Ark. 106; *Louisville & N. R. Co. v. Ricketts*, 96 Ky. 44; 1 Thomp. Neg. 459, and cases cited; *Mich. Cent. R. Co. v. Coleman*, 28 Mich. 440; *Frost v. Grand Trunk R. Co.* 10 Allen, 387; *McDonald v. C. & N. W. R. Co.* 26 Iowa, 124; *Todd v. O. C. & F. R. R. Co.* 3 Allen, 18; *Railroad Co. v. Jones*, 95 U. S. 439; *Harvey v. E. R. Co.* 116 Mass. 269; *Jewell v. C., St. P. & M. R. Co.* 54 Wis. 610; *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. St. 294; *Torrey v. B. & A. R. Co.* 147 Mass. 412; *Baltimore & Y. Turnpike Road Co. v. Cason*, 72 Md. 377; *Dun v. S. & R. R. Co.* 78 Va. 645; *Bon v. Railway Passenger Asso. Co.* 56 Iowa, 664, 667; *Paterson v. Cent. R. & B. Co.* 85 Ga. 653.

For the respondent there was a brief by *John W. Hancock*, *Edwin A. Jaggard*, and *Oscar A. Turner*, and oral argument by *Mr. Jaggard.*

The following opinion was filed March 16, 1897:

PINNEY, J. The carrier owes to its passenger, while that relation exists, the duty of providing reasonably safe stations, whether permanent or temporary, where he may await the arrival of trains, as well as the duty to seasonably warn him, when reasonably necessary, of any existing or apprehended danger which may interfere with or imperil his personal safety. The defendant contends it performed towards the plaintiff the full measure of its duty, and that the proximate, or at least a contributing, cause of the plaintiff's injury was his own negligence in unnecessarily exposing himself to danger. The point to which the plaintiff and his fellow passengers were directed to go by the defendant's agents, and to which he went as a temporary station, as thus directed, to wait for the train which was to convey him and his fellow passengers eastward to their respective destinations, was the gap opened about sixteen rods east of the burning wreck, and at and east of which the mail, express matter, and baggage had been deposited. The wreck and remaining naphtha and the kerosene oil in the oil tank were burning fiercely, and flames were shooting from the joints in the oil tank or car, and flashed up to the height of many feet, making at times a loud, roaring noise. The gaps opened in the right of way fence, on the south side of the railway, by which a way had been opened around the burning wreck, diverged to the south, in order to avoid it. The details of the entire scene, about which there is no material dispute, were open and obvious, even to a casual observer, and gave clear and emphatic warning to the humblest intelligence of impending danger from the burning tank of oil. The situation spoke for itself, and in no uncertain tones. The plaintiff had nothing to do but to observe these facts as they appeared before him, and to consult his own safety. His actual transit as a passenger had been interrupted, and, until the train arrived from the east, he was free to go and

come as he chose, and the company had no power to restrain him in the least.

1. Whether the company had performed its entire duty towards him, under the circumstances, or not, it was his duty to exercise ordinary care and caution to secure his own safety. The railway company was not an insurer of his personal safety, and it is familiar law that, under the circumstances stated, the duties of the plaintiff and of the defendant to observe proper care and caution are reciprocal. If the plaintiff failed to exercise ordinary care and caution, and by reason of such failure he sustained the injuries complained of, he was guilty of contributory negligence, and must be held to have assumed the consequent risk or danger of injury. Assumption of risk in such cases is a species of contributory negligence. *Darcey v. Farmers' L. Co.* 87 Wis. 249; *Nadau v. White River L. Co.* 76 Wis. 120, 131. The plaintiff was in the open country, and under no restraint. Whatever of danger there was in consequence of the alleged negligence of the defendant, he was free and able to avoid it. It is not a question of what he thought or believed would be safe and prudent, under the circumstances, for him to do. If he unnecessarily exposed himself to a danger, obvious to a person of ordinary care and prudence, and was injured in consequence, he cannot recover. He was an adult, and must be held bound to the exercise of the same care and prudence as a person of ordinary care, intelligence, and judgment. The defendant, on the other hand, had a right to assume that the plaintiff would act with reasonable care and caution, and occupy the position or situation to which he had been conducted; and we are unable to perceive anything in the case to warrant the inference that the defendant had any reason to apprehend that the plaintiff would expose himself to or incur unnecessary danger. The actual transit of the plaintiff in the defendant's passenger train having been interrupted, its duty required that it should ex-

ercise towards the plaintiff at the temporary station, as it is called, to which he had been directed, such reasonable and proper care as one of ordinary care and prudence would exercise under the circumstances. The plaintiff appears to have disregarded all the plain and obvious warnings of danger suggested by the facts and circumstances, and which could not have failed, it would seem, to arrest the attention of a person of ordinary intelligence, care, and prudence.

The special verdict finds that, if the plaintiff had remained at the place designated, "he would not have been seriously injured," but that he "unnecessarily, and from motives of curiosity and pleasure, went from there to a place much nearer the burning tank," as already indicated, and where he remained twenty minutes, and up to the time of the explosion from which he received his injuries; that "the plaintiff's injuries were *caused by reason of his so going nearer the burning tank.*" It is true that it is found that the defendant, its officers, etc., "in the exercise of ordinary prudence, should have known of the plaintiff's position in time to warn him of the *danger which threatened* on account of the burning tank," and that in the exercise of reasonable care they ought "to have anticipated that the plaintiff would go nearer to the burning tank, and *thus incur unnecessary danger;*" and they found that the defendant gave the plaintiff warning with respect to the danger to which he was exposed by virtue of the presence of the burning tank, but that "it was insufficiently or negligently given." The jury acquitted the plaintiff "of any want of ordinary care that contributed to his injury," and found that he was "not guilty of any want of ordinary care, however slight, in so going much nearer the burning oil tank," and that "a reasonably prudent man, under the circumstances, situate as the plaintiff was, with his means of knowledge, would not have anticipated that there was danger of an explosion of the burning oil tank." The verdict finds that the defendant's officers,

etc., "by the exercise of ordinary care and prudence, would have anticipated that an explosion might occur," and "did not exercise reasonable care and prudence in designating a safe place where the plaintiff and other passengers were to take the train which was to carry them east;" and that, through its officers, etc., it was "guilty of negligence, which was the proximate cause of the plaintiff's injuries."

The verdict is inconsistent and contradictory on vital points, and no judgment should have been entered on it. It was the duty of the defendant to give proper and sufficient warning of actual or apprehended danger; but the evidence tends to show quite clearly that the plaintiff had ample notice, from the situation and circumstances, of the danger to be apprehended from the burning wreck and tank of kerosene. A considerable number of witnesses on the part of the defendant gave evidence tending to show that its agents and servants gave reasonable warning of danger, and indicated where the passengers were to remain; but the plaintiff denied that he heard anything of the kind, and so did two others who testified in his behalf. Aside from this, there was little or no material dispute as to the facts. The question is as to the proper inferences to be drawn from them. The highly inflammable and dangerous character of kerosene is a matter of common knowledge. Its irregular and rapid combustion from a lamp in an ordinary room justly conveys alarm and an immediate sense of danger. Here was an entire tank or car of it, upon a burning wreck, and in a highly heated condition, and flames escaping from joints in the tank. It was liable at any time to explode with great violence and serious injury. It would seem that no notice that could be given would convey more clearly a sense of impending danger than the actual situation, open and obvious to any one who would make a reasonable use of his senses.

2. The plaintiff cannot recover for injuries caused by the defendant's negligence if he himself failed to exercise proper

care and his own negligence contributed to the result. In *Hickey v. B. & L. R. Co.* 14 Allen, 429, the rule we think applicable to the case is stated: That if an injury has happened while a party is occupying a place provided for the accommodation of passengers, nothing further is ordinarily necessary to show due care on his part; but when the evidence shows that he left the place assigned for passengers, and was occupying an exposed position, and "that the injury was due in part to the fact of such position, he must necessarily fail, unless he can also make it appear that by some ground of necessity or propriety his being in that position was consistent with the exercise of proper care or caution on his part." All the adjudged cases agree that a person who seeks to recover for a personal injury sustained by another's negligence must not himself be guilty of negligence which substantially contributes to the result. *Railroad Co. v. Houston*, 95 U. S. 697–702; *Indermaur v. Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 313; *Reynolds v. N. Y. C. & H. R. R. Co.* 58 N. Y. 248, 252. A passenger is not justified in incurring risks unnecessarily, however rare the chances may be that he will suffer by it (*Todd v. O. C. & F. R. R. Co.* 3 Allen, 18); and, "if passengers voluntarily take exposed positions, with no occasion therefor caused by the managers of the road, except a bare license by noninterference or passive permission of the conductor, they take the special risks of that position on themselves" (*Sweeny v. O. C. & N. R. Co.* 10 Allen, 368; *Penn. R. Co. v. Zebe*, 33 Pa. St. 318–327; *Coleman v. Second Ave. R. Co.* 114 N. Y. 609, 612, 613). The plaintiff in this case voluntarily, and out of mere curiosity and for his own pleasure, took an exposed position, not intended or pointed out for passengers, and he cannot hold the defendant liable for injuries to which such act contributed. *Torrey v. B. & A. R. Co.* 147 Mass. 412, 413. The defendant and its agents were not bound, under the circumstances of this case, to restrain the plaintiff by physical force

in order to keep him out of manifest danger, which was as obvious to him as to them. It was not negligence on their part that they did not restrain him by physical force from unnecessarily exposing himself to danger from the burning tank of oil. *Penn. R. Co. v. Zebe*, 33 Pa. St. 327; *Hickey v. B. & L. R. Co.* 14 Allen, 433.

3. The relation of carrier and passenger we think existed between the plaintiff and defendant at the time of his injury, although his actual transit as such had been interrupted for the time being, and he had been directed, and had proceeded, to a place on the defendant's premises, to await the arrival of another train upon which to complete his journey. He had not abandoned his right to complete it in the defendant's cars. He had merely taken up, it is claimed, an exposed and dangerous position with reference to the burning tank of oil on the defendant's right of way, which may, perhaps, disentitle him to recover on account of the injuries he received.

4. The defendant did nothing, either expressly or by implication, to invite, entice, or allure the plaintiff to the position of danger he appears to have voluntarily and unnecessarily assumed. Neither the impending danger, nor its cause, was concealed. He was not a child of immature years, but an adult, and, as we must assume, of reasonable intelligence, judgment, and prudence. With a full knowledge of the facts, or the means of knowledge before him, he took this position of danger, and kept it for twenty minutes before the explosion, watching the tank and its surroundings, to gratify his curiosity. The case does not come within the rule of *Bennett v. Railroad Co.* 102 U. S. 577, and cases there cited. Here there was no pitfall or trap, nor had there been any invitation to the plaintiff, express or implied, to occupy the position he did. He was still under obligation to use reasonable care on his part for his own safety. Nor is the case, for the reason stated, governed by the principles

upon which the cases of *Railroad Co. v. Stout*, 17 Wall. 657; *Keffe v. M. & St. P. R. Co.* 21 Minn. 207–211; and *Union P. R. Co. v. McDonald*, 152 U. S. 262, much relied on by the plaintiff, were decided.

5. In respect to the alleged negligence of the defendant, the court erroneously charged the jury "that it was the duty of the carrier to exercise extraordinary vigilance, aided by the highest skill, and to exercise the highest degree of care, to prevent the interposition of any obstacle to expose the plaintiff to danger while waiting for the train to arrive;" although the court correctly said, elsewhere in the charge, that the duty the defendant owed to the plaintiff, to protect him from injury from the burning oil tank, was "only that of ordinary care and prudence, and no greater, under like circumstances, than the obligation the plaintiff was under to protect him from such danger and consequent injury." The charge upon this material point was contradictory and misleading, and constitutes reversible error. A railroad company is held to the highest degree of care in respect to the condition and management of its engines and cars, for negligence in that respect involves extreme peril to passengers, against which they cannot protect themselves. *Moreland v. B. & P. R. Corp.* 141 Mass. 31; *Morris v. N. Y. C. & H. R. R. Co.* 106 N. Y. 678; *Kelly v. Manhattan R. Co.* 112 N. Y. 443; *Palmer v. Pennsylvania Co.* 111 N. Y. 488. The plaintiff was under no restraint, and was free to adopt such precautions as might seem necessary to protect himself from injury, and the defendant was bound to the exercise of only ordinary care and prudence, in view of the situation and existing circumstances.

6. The questions of negligence on the part of the plaintiff, as well as of the defendant, were in this case, we think, for the jury in the first instance, under proper instructions from the court. What may be negligence under some circumstances and conditions may not be under others. It is to be

inferred from the facts and circumstances given in evidence, and is for the jury, where the conclusion is debatable or rests in doubt. *Langhoff v. M. & P. du C. R. Co.* 19 Wis. 497. If the jury arrive at conclusions wholly unwarranted, the court, in the exercise of sound discretion, may set aside the verdict and grant a new trial. *Valin v. M. & N. R. Co.* 82 Wis. 5, 6, and cases cited. Judgment could not be given for either party on the verdict by reason of its being inconsistent and contradictory, or upon the uncontradicted evidence, until the verdict, or the conflicting portions of it, were set aside. The defendant could not have judgment *non obstante veredicto. Sheehy v. Duffy*, 89 Wis. 13. The defendant, in order to render its main contentions available in this court, should have moved the trial court to set aside the parts of the special verdict not sustained by the evidence, and for judgment on the remainder and on the uncontradicted evidence. This practice was held proper in *Menominee River S. & D. Co. v. M. & N. R. Co.* 91 Wis. 447, 457, 458. In *Schweickhart v. Stuewe*, 75 Wis. 160, where the previous cases were cited, it was said that the "utmost extent to which this court has gone in authorizing the trial court to disregard the special verdict rendered by a jury, where such verdict is wholly unsupported by the evidence, is to set aside such verdict, and then, in its discretion, and not as an absolute duty, to enter judgment in accordance with the undisputed evidence in the case, or to set aside the verdict entirely and grant a new trial." *J. & H. Clasgens Co. v. Silber*, 87 Wis. 357; *Murphey v. Weil*, 89 Wis. 150, 151. It is only where there is no evidence to support a material finding that it can be set aside or stricken from the record, but, where it is against the decided preponderance of the evidence, upon setting it aside, there should be a new trial. *Sheehy v. Duffy, supra; Ohlweiler v. Lohmann*, 82 Wis. 198; *Dahl v. Milwaukee City R. Co.* 65 Wis. 371; *Annas v. M. & N. R. Co.* 67 Wis. 60. This court has no original power to correct or

to set aside any part of a special verdict. Its jurisdiction of such matters is appellate only. All applications for that purpose must be made to the trial court.

For the reasons stated, there must be a new trial.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

A motion for a rehearing was denied May 21, 1897.

For a note on the rights and liabilities of the parties when a passenger temporarily leaves the vehicle before completion of his journey, see *Finnegan v. C., St. P., M. & O. R. Co.* (48 Minn. 378) in 15 L. R. A. 899.— REP.

THE STATE EX REL. THE CITY OF MILWAUKEE, Plaintiff in error, vs. NEWMAN, Defendant in error.

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April 9 — May 21, 1897.

Gambling: Municipal ordinances: Penalty for offense punishable also under statute: Constitutional law: Searches and seizures: Return of search warrant: Detention of person arrested: "Due process of law."

1. An action by a city to recover a penalty for the violation of a municipal ordinance prohibiting an act which is a crime or misdemeanor and punishable at common law or by statute, and prescribing a penalty for its violation by fine with imprisonment on default of payment, is *quasi*-criminal.
2. Although an act is a penal offense under the laws of the state, further penalties for its commission may, under proper legislative authority, be imposed by municipal by-laws or ordinances; and the enforcement of the one does not preclude the enforcement of the other.
3. A municipal ordinance providing that if any person shall make oath before the police court that "he suspects and believes, or has good reason to suspect and believe, that any house or other building, room or place is used as and for a gaming house, room or place, for the purpose of gambling . . . and that persons re-

sort thereto for that purpose," the court, "whether the names of the persons last mentioned are known to the complainant or not," shall issue a warrant commanding the officer executing it "to enter such house, building, room or place, and to arrest the keeper thereof and all persons found gambling," and "all persons there found whether playing, gaming, or otherwise," and to take possession of all gambling implements and devices, etc.—is *held*, in respect to the keeper of such a house, not to be in violation of sec. 11, art. I, Const., forbidding unreasonable searches and seizures and providing that no warrant shall issue but upon probable cause and particularly describing the place to be searched and the persons or things to be seized.

4. A provision in such ordinance that it shall be sufficient to sustain a conviction of a person charged with being the keeper of a gambling house to show that when arrested he was in charge of the building and that gambling implements were at that time found therein, is an independent one and, if void, does not invalidate the other portions of the ordinance.

5. The return of a search warrant which is the basis of the prosecution under a municipal ordinance of a person arrested under the warrant as the keeper of a gambling house, must state with clearness and certainty the facts authorizing the arrest under the ordinance.

6. A person arrested while violating a city ordinance against gambling, under a search warrant not naming him and issued upon an affidavit making no direct charge against him, cannot, after being brought before the court, be detained on such warrant alone, pending an adjournment of the case for trial; but a complaint in due form should be lodged against him and process thereon issued for his detention.

ERROR to review a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

This is a writ of error to the circuit court for Milwaukee county, bringing up for review the proceedings had in that court upon a writ of *certiorari* issued to Hugh Ryan, Esq., a court commissioner for Milwaukee county, in the matter of a writ of *habeas corpus* issued by said court commissioner on the petition of the defendant in error, claiming to be illegally imprisoned and restrained of his liberty by the sheriff of Milwaukee county.

The petition of the defendant in error to the court commissioner, Ryan, is in the usual form, and stated that about the 9th of November, 1895, one James Markey filed in the police court of the city of *Milwaukee*, Milwaukee county, Wisconsin, a sworn complaint "that he has good reason to suspect and believe, and does suspect and believe, that certain rooms on the second floor of the building known as No. 208 West Water street, in the said city and county of Milwaukee, are used as and for a gaming house, gaming rooms, and a gaming place, for the purpose of gambling for money and other property, and that persons resort thereto for that purpose, contrary to the provisions of an ordinance entitled 'An ordinance for the suppression of gambling and gambling houses,' passed by the common council of said city August 11, 1890," wherefore he prayed that a warrant might be issued out of said police court, pursuant to said ordinance; whereupon a warrant was issued out of said court to the sheriff of said county, his deputy, policemen, or any constable of said county, commanding them, in the name of the state of Wisconsin, "to enter said house, building, rooms, and place, and to arrest all persons who should be found playing for money and other things of value, and all persons who should be found, whether playing, gaming, or otherwise, and also the keeper thereof, and take into your custody and possession all of the implements of gaming, tables, wheels, and other constructions, cards, dice, chips, devices, schemes, contrivances, and things adapted, suitable, devised, and designed, and which can or shall be used, for gambling purposes, which may there be found, and all of the same, and forthwith bring before the police court of the city of *Milwaukee* all of the said persons there found, and all said implements, tables, wheels, and other constructions, cards, dice, chips, devices, schemes, contrivances, and things, to answer to said city of *Milwaukee* as in and by said ordinance provided."

The sheriff returned to the writ of *habeas corpus* that the within-named *George Newman* was in his custody "by virtue of said warrant issued out of the police court of the city of *Milwaukee*, in which said *George Newman* is charged with being the keeper of a gambling house, contrary to the provisions of the ordinance of the city of *Milwaukee* referred to in said warrant, a copy of which said warrant is hereto annexed, and the original of which is in my possession, and, as commanded herein, I herewith produce *George Newman* before the court." Indorsed upon the said warrant was the following: "I, the undersigned, a police officer of the city and county of Milwaukee, state of Wisconsin, hereby certify that, by virtue of the within and annexed warrant, I arrested *George Newman*, as the keeper of the gambling house referred to in the within-annexed warrant; that I arrested Harry Nickerson, Jacob Yablowski, Anton Prebel, Gust Werner, James Polk, and Sam Goran, as inmates of the within-described gambling house; and that I then and there seized, and have in my possession, the within and following described property, by me taken from said gambling house, room, and place, and have the bodies of said persons so by me arrested as aforesaid, and have the implements and property so by me seized as aforesaid, now in custody before the court, and which said property and implements so by me seized as aforesaid are more particularly described in the schedule attached to this, my return to said warrant, and which said schedule is made a part hereof, and is by me signed. Dated, Milwaukee, November 11, 1895. Albert Genthe, Police Officer." "The schedule of property and implements by me seized, and referred to in the annexed return, of which this is a part: 1 poker table, 18 packages of playing cards, 1,184 chips. Albert Genthe, Police Officer."

The petitioner, *George Newman*, demurred to the said return, and said commissioner sustained said demurrer and discharged the petitioner, holding that the ordinance under

which he was held was unconstitutional and void. Upon the application of the city attorney of the city of *Milwaukee*, a writ of *certiorari* was issued out of the circuit court to review the proceedings in said matter, to which the said court commissioner made return of the proceedings before him in said matter, whereupon, after argument, it was adjudged that said discharge granted by the commissioner be affirmed.

By the city charter (Laws of 1874, ch. 184, subch. IV, sec. 3) the common council was empowered "to make, enact, ordain, establish, publish and enforce all such ordinances . . . for the government and good order of the city, . . . for the suppression of vice, for the prevention of crime," as they should deem expedient, and to declare and impose penalties, and to enforce the same against persons violating the same, and such ordinances were declared to be and have the force of law, if not repugnant to the constitution of the United States or of this state; and by subd. 4, "to restrain or prohibit all descriptions of gaming and fraudulent devices and practices, and all play of cards, dice and other games of chance, for the purposes of gaming in said city;" by subd. 5, "to authorize the destruction of all instruments and devices used for the purposes of gaming;" and by subd. 60, "to authorize the arrest, fine and imprisonment of keepers, exhibitors or visitors at any gambling table, gambling house," etc.

The ordinance (sec. 1) provides, in substance, that if any person shall make oath before the police court, or the clerk thereof, that "he suspects and believes, or has good reason to suspect and believe, that any house or other building, room or place, is used as and for a gaming house, room or place, for the purpose of gambling for money or other property, and that persons resort thereto for that purpose," the court or clerk thereof, "whether the names of the persons last mentioned are known to the complainant or not, shall issue a warrant commanding the sheriff of the county, etc.,

or any police officer of said city, to enter such house, building, room, or place, and to arrest all persons who shall be found playing for money or other thing of value, and all persons who shall there be found, whether playing, gaming, or otherwise, and also the keeper thereof, and take into their custody and possession all of the implements of gaming, tables, wheels, or other constructions, cards, dice, chips, devices, schemes, contrivances, and things adapted, suitable, devised, or designed, or which can or shall be used, for gambling purposes, which may there be found, and all of the same, and shall retain and hold the same until the same shall be disposed of" as provided in the ordinance. The second section provides that "the officer making such arrest shall keep the persons and keeper, so arrested, in his custody until the next regular session of the court thereafter [a session being held every morning, Sundays and legal holidays excepted], when he shall make return of his doings thereunder to said court, and also take the persons or keepers, so arrested, before said court for trial, unless they be sooner discharged, or released, by due course of law;" and by sec. 9 the officer was required to make return of the warrant to the court, and of his doings thereon, and, if any person is arrested by virtue thereof, "the names of such persons shall be stated in such return, and also a statement whether he was so arrested as keeper or inmate of a gambling house," and if any gambling devices, etc., such as are mentioned in sec. 1, shall have been seized, he shall attach to his return a list or schedule thereof.

By the third section it was provided that, upon bringing such parties before the court, a complaint should be made against such keeper, in which he should be charged with keeping a gaming house, building, room, or place, and also against the persons so arrested, in which they should be charged with being inmates of a gambling house, etc., etc. The complaints "shall be made in the action or proceeding in which the warrant mentioned was issued, and shall be

considered a part of such action or proceeding." They are to be made "by the city attorney, or his assistant, in the manner provided by, and in accordance with the provisions of, the charter of said city, and the rules and practice of the court, and need not be verified." By the fourth section, a trial is to be had upon such complaint as "in other cases, actions and proceedings brought to punish for violations of the ordinances of said city under the charter," and adjournments may be had. The defendant or defendants in the meantime "shall be detained in the custody of the officer, or admitted to bail, as in other actions for violations of the ordinances of the city." By the fifth section it is provided in substance that it shall be sufficient to sustain a conviction upon any complaint against any person charged with being the keeper of a gambling house "to show that the person so charged, at the time of his arrest, was in charge of the house or building in which he was arrested, and that at the time of his arrest there was found in such house, or building, room or place, so in his charge, or under his control, the gambling instruments, contrivances or devices" mentioned in sec. 1; and as against one charged with being an inmate of a gambling house, etc., to show "that the person so charged, at the time of his arrest, was present in the house, building," etc., "described in the warrant, and that there were found in the place where he was arrested, and in his presence, the gambling implements, contrivances or devices mentioned in said section one." By section 7, one convicted of being a keeper of a gambling house is to be punished by a fine of not less than $100 nor more than $500, and the costs of the prosecution, and, if not paid, to be imprisoned in the common jail or house of correction until paid, but not longer than ninety days. By section 8, one convicted of being an inmate of such a house is to be punished in like manner, the fine to be not less than $10 nor more than $25, and the imprisonment not to exceed thirty days. By section 10, after conviction

of the keeper the court is to proceed, upon the return to said warrant and any answer the keeper may make thereto, to hear, try, and determine whether the devices, etc., seized, or any part of them, "are devices, schemes," etc., etc., "adapted, suitable, devised or designed for gambling purposes, and whether they were taken from the gambling house, room," etc., "in which such keeper was found," and, if these matters are found in the affirmative, the court is to order the same to be destroyed.

For the plaintiff in error there was a brief by *C. H. Hamilton*, city attorney, and *Howard Van Wyck*, assistant city attorney, and oral argument by *D. S. Rose*.

For the defendant in error there was a brief by *Ernest A. Kehr*, and oral argument by *Mr. Kehr* and *Mr. W. C. Williams*.

PINNEY, J. 1. The ordinance brought in question by this proceeding was framed for the discovery and suppression of gambling and gambling houses in the city of *Milwaukee*. It subjects the keeper of the gambling house, room, or place, and all persons who shall be there found, whether playing, gaming, or otherwise, to the penalties prescribed. The keeping of a common gambling house, as well as betting, wagering money or any thing of value, upon any game of cards, dice, or other device, are misdemeanors by the general statute. R. S. secs. 4529, 4530. And by secs. 4539 and 4840 search warrants for the detection and discovery of gambling and gaming devices, etc., are authorized to be issued, substantially under similar circumstances as provided by the ordinance. The proceeding against the petitioner, *Newman*, for keeping a gaming house was *quasi*-criminal, although prosecuted in the name of the city. *Boscobel v. Bugbee*, 41 Wis. 59; *Platteville v. Bell*, 43 Wis. 488. In *Platteville v. McKernan*, 54 Wis. 487, it was held that where a city or village ordinance prohibits that which is a

crime or misdemeanor and punishable at common law or by statute, and prescribes a penalty for its violation by fine, with imprisonment on default of payment, as in the present case, the action to recover such penalty is *quasi*-criminal. *Oshkosh v. Schwartz*, 55 Wis. 487; *State ex rel. Hamilton v. Municipal Court of Milwaukee*, 89 Wis. 361. Although the action is *quasi*-criminal, the right of action for the penalty is in the city, and the common council had a right, under the provisions of the charter, to enact a proper and suitable ordinance to restrain and prohibit gaming, and, as incident thereto, to provide for the issue of search warrants as a means of detection and suppression of violations of the ordinance. It seems to be the clear weight of authority that an act may be a penal offense under the laws of the state, and that further penalties, under proper legislative authority, may be imposed for its commission by municipal by-laws or ordinances, and the enforcement of the one would not preclude the enforcement of the other. Cooley, Const. Lim. 239, and cases cited. In *Mayor v. Allaire*, 14 Ala. 400, where a city ordinance imposed a fine for assault and battery committed within the city limits, and its validity was questioned, the court said: "The object of the power conferred by the charter, and the purpose of the ordinance itself, was not to punish for an offense against the criminal justice of the country, but to provide a mere police regulation for the enforcement of good order and quiet within the limits of the corporation. So far as an offense has been committed against the public peace and morals, the corporate authorities have no power to inflict punishment. . . . The offense against the corporation and against the state are distinguishable and wholly disconnected, and the prosecution, at the suit of each, proceeds upon a different hypothesis. The one contemplates the observance of the peace and good order of the city. The other has a more enlarged object in view,— the maintenance

of the peace and dignity of the state." The great weight of authority is clearly in support of this view (1 Beach, Pub. Corp. § 510, and cases cited); though the author expresses the view that the cases opposed, while fewer in number, are sounder in principle. The ordinance in question is a police regulation for the city, passed under competent legislative authority, the better to subserve good morals and civil order in a large city, where the necessity of stringent police regulations is greater than in rural or less densely settled communities.

2. It is objected that the ordinance violates the provision of the constitution (art. I, sec. 11) which declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article IV of the constitution of the United States contains substantially the same provision. "The things here forbidden are two — search and seizure. And not all searches nor all seizures are forbidden, but only those that are unreasonable. Reasonable searches, therefore, may be allowed; and if the thing sought be found, it may be seized." Per MILLER, J., in *Boyd v. U. S.* 116 U. S. 641. The object of the constitutional provision was to abolish searches by general warrants, which authorized searches in any place or for any thing. Searches founded on affidavits which describe the thing to be searched for, the person and place to be searched, are not unreasonable, and are still permitted. In the same case, Mr. Justice BRADLEY said that "laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within the category of unreasonable

searches and seizures. *Comm. v. Dana*, 2 Met. 329. Many other things of this character might be enumerated." 116 U. S. 623, 624. The subject of what are reasonable searches and seizures was elaborately considered in *Glennon v. Britton*, 155 Ill. 233, in which it was held that a search warrant might be issued for the search and seizure of property deemed by law pernicious or dangerous to the public welfare, and the wrongful use of which is surreptitious, or so concealed that discovery cannot be had by ordinary process or diligence, where the officers are apprised that the law has been violated, and that searches and seizures of gambling implements are not within the inhibition of federal or state constitutions, which guarantee the citizen immunity against unreasonable searches and seizures. In this case PHILLIPS, J., said: "Experience has shown that while the property, materials, and paraphernalia may be seized, and the immoral resort or rendezvous thus, perhaps, broken up, the proprietors, or those who engage in the immoral or nefarious business, are on the alert, and not unfrequently evade, if they do not altogether escape, the just penalties of the law. The object of the proceedings to be instituted under the statute is that the unlawful and immoral practice be stopped, by destroying implements, apparatus, material, etc., with which it is carried on. The theory is, in respect to such property, that no one is longer the owner of it."

Under the warrant issued pursuant to the ordinance under consideration, the particular house, building, room, or place to be searched is specified; and the persons implicated are described, in general, as persons who resort thereto for gambling, contrary to the provisions of the ordinance, and who are found present when play is in progress, whether engaged in play or not. The officer is "to arrest all persons found playing for money, or other thing of value, and all persons who shall there be found, whether playing, gaming or otherwise, and also the keeper thereof." For the arrest

and detention of persons caught in actual violation of the ordinance, no warrant was necessary. *Hawkins v. Lutton*, 95 Wis. 492. The validity of statutes or ordinances such as the present, authorizing searches for and seizures of gambling implements, and the arrest of persons engaged in using, or present when used, is universally sustained as a proper and justifiable police measure for the detention, suppression, and punishment of gambling. *People v. Hanrahan*, 75 Mich. 611; *Hastings v. Haug*, 85 Mich. 87; *Comm. v. Dana*, 2 Met. 329. This ordinance is similar in most of its provisions to the statute in Massachusetts in regard to entering common gaming houses, arresting parties engaged in violation of the law, and seizing gaming implements. Pub. St. Mass. ch. 99, sec. 10, and sec. 2, ch. 449, Laws of 1887, amendatory thereof. The case of *Comm. v. Warren*, 161 Mass. 281, as to the circumstances under which persons will be regarded as present at any game played for money, whether engaged in playing or not, if the implements of gaming are found in the place searched, as well as *Comm. v. Adams*, 160 Mass. 310, have material bearing upon the questions under consideration.

3. It was contended that the provision of the ordinance authorizing the arrest, by the officer executing the search warrant, in addition to those found playing for money, etc., of "all persons who shall there be found, whether playing, gaming or otherwise," was void. While this question is not strictly material to the case before us, in respect to the keeper of the house, we think it proper to call attention to the fact that similar provisions in the Massachusetts statutes have been upheld in *Comm. v. Smith*, 166 Mass. 370, where it was said: "It is unnecessary, under the statute, to allege the defendant's knowledge of the presence of the implements or the character of the place. The statute means that people enter such places at their peril. . . . When, according to common experience, a certain fact generally is accompanied by knowledge of the further elements necessary to

complete what it is the object of the law to prevent, or even short of that, when it is very desirable that people should find out whether the further elements are there, actual knowledge being a matter difficult to prove, the law may stop at the preliminary fact, and, in the pursuit of its policy, may make the preliminary fact enough to constitute a crime. It may say that, as people generally do know when they are selling intoxicating liquors, they must discover at their peril whether what they sell will intoxicate. It may say that, if a man will have connection with a woman to whom he is not married, he must take the chance of her turning out to be married to some one else. *Comm. v. Elwell*, 2 Met. 190; *Comm. v. Murphy*, 165 Mass. 66. In like manner it may say that people are not likely to resort to a common gaming house without knowing it, and that they must take the risk of knowing the character of the place to which they resort, if the implements of gaming are actually present." See Laws of Mass. 1895, ch. 419, secs. 2–4.

4. It would not, we think, be a defect fatal to the ordinance, if it should be held that the common council had no authority to enact the rule of evidence contained in sec. 5. This provision is an independent one, and, if held invalid, the offense could well be prosecuted, and a conviction be had, under the common-law rules of evidence. This question relates only to the trial, and we give no further opinion in respect to it.

5. The ordinance, as a police measure, provides for a single proceeding, commencing with the issuing of the search warrant, and upon the proper execution of which the keeper and inmates found in the gambling house, building, room, or place may be arrested, and, upon sufficient return made, complaints may be filed against them, which "shall be considered a part of the action or proceeding," and adjournments of which may be had, and upon which a trial and conviction may take place; the defendants in the meantime

to "be detained in custody of the officer, or admitted to bail, as in other actions for violation of the ordinances of the city." After the conviction of the person arrested as the keeper of the gambling house, "the court in which the said conviction is had shall immediately proceed, *upon the return of the officer* making the arrest, and such schedule [as may be to said return attached], and *any answer* said keeper may make thereto, to hear, try and determine whether or not the devices," etc., "seized by the officer and described in his return," or any part of them, are devices, schemes, etc., "adapted, suitable, devised or designed for gambling purposes," and whether they, or any part thereof, were taken from the gambling house, etc., where the keeper was found; and, if these matters be found in the affirmative, the court is to make an order for their destruction, and they are to be destroyed accordingly.

6. The return of the officer upon the warrant is vague and indefinite. It does not appear from it that *Newman*, the petitioner, arrested as the keeper of the gaming house searched, or those arrested as inmates, were either of them found or arrested in the building, room, or place authorized by the warrant to be searched. In a proceeding of such a drastic and summary character nothing should be left to inference, but all material facts should be stated in the return with clearness and certainty, so as to justify and support the subsequent proceedings required to be taken upon the return of the warrant. This leads us to the consideration of the question whether, when the writ of *habeas corpus* was sued out, the petitioner was held in custody by "due process of law." His name is not mentioned in the search warrant, or in the affidavit upon which it issued. In brief, he is not charged, so far as the sheriff's return to the writ of *habeas corpus* shows, with any offense, or held by any process directed against him personally. From his petition it appears that he was arrested under the search warrant, and brought before the police court, November 9, 1895, for

trial, but for what offense it is not stated; that the trial was continued until the 27th of the same month, and for want of bail he was held in custody, imprisoned, etc., by Sheriff Stanley, under and by virtue of said proceedings, and not otherwise. There is nothing in the return or record to show that any complaint had been filed against him or was pending in the police court. The fact that he was arrested while violating the ordinance would justify his detention for the usual and reasonable time to take him before the court or magistrate when and where a complaint in due form might be lodged against him, but it would be an unheard-of and wholly unjustifiable course of proceeding to hand an accused party over to the sheriff or other officer without warrant or commitment founded upon information or complaint against him upon which process might issue. It was necessary, when the case was adjourned for trial, that appropriate process, properly warranted and supported, for his detention, should have been, but none appears to have been, issued. The only appearance of authority the sheriff had was the original warrant, in which the petitioner was not named, issued upon an affidavit making no direct charge against him, and the fact that he was arrested by the officer while, perhaps, in the commission of the offense specified in the ordinance. The detention and restraint of which the petitioner complains were not, for these reasons, we think, by "due process of law." Const. Wis. art. I, sec. 8, as amended; Amendm. Const. U. S. art. XIV, sec. 1. An indictment or information duly found, or complaint filed, and a proper order or warrant thereon, were indispensable to his lawful detention. Under the general law, an information can be filed only in cases where there has been a hearing on a preliminary examination, or where it has been waived by the accused. We do not think that it was in the power of the common council to justify the arrest and detention of persons for violations of city ordinances, without "due process of law," founded

upon information or sufficient complaint. "Due process of law," as applied to arrest and detention of persons and judicial proceedings in general, means "law in its regular course of administration, according to the prescribed forms, and in accordance with the general rules for the protection of individual rights." *Rowan v. State*, 30 Wis. 149. It is process founded on, and according to the course of, proceedings applicable to the subject matter, and conformable to those general rules which affect all persons alike, observing and conforming to the general rules respecting the liberty and safety of the person, "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia v. Okely*, 4 Wheat. 244; *Westervelt v. Gregg*, 12 N. Y. 209–212. Due process of law is required and intended to protect the life, liberty, and property of the citizen against acts of mere arbitrary power in any department of the government, and it means law in its regular course of administration through the courts of justice. Cooley, Const. Lim. 431 *et seq.* Whether a complaint signed by the city attorney without previous public examination of the accused, and not otherwise verified than by his official signature, is due process of law in this respect, is a point not here involved, and upon which we express no opinion. Inasmuch as it is not made to appear that the petitioner was duly charged, by a sufficient complaint, with having violated the ordinance, we think that there was no authority for the detention or imprisonment of which he complains.

Upon the grounds and for the reasons stated, we must hold that the judgment of the circuit court affirming the order of the court commissioner discharging the petitioner was correct and must be affirmed.

By the Court.— Judgment is ordered accordingly.

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ARNDT, Respondent, vs. KELLER and wife, Appellants.

April 30 — May 21, 1897.

Building contracts: Failure to complete: Condition precedent: Recovery for work done.

Though a contract provides for the payment of a specified sum for constructing a building, payable upon its completion, if it provides also that upon failure to complete the building the owner may complete it at the contractor's expense, full performance is not a condition precedent to a recovery by the contractor, but upon such completion by the owner the contractor may recover the contract price, less the reasonable cost of completing the building so far as the same could be done practicably, the damage by delay, and the diminished value when completed because of defects not remediable without unreasonable expenditure.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

This was an action to enforce a lien for material and labor furnished by plaintiff as principal contractor. The complaint was in the usual form. The amount claimed to be due was $746.42. The answer, by proper allegations, set forth that the alleged indebtedness accrued under a contract to build and complete a building according to certain plans and specifications, within a certain time, for a stipulated price. It alleged nonperformance of the contract, put in issue the amount claimed to be due, and counterclaimed for damages.

On the trial the defendant *Frank C. Keller*, with whom the contract was made, and who was the owner of the building sought to be charged with the lien, requested submission to the jury of questions covering all the issues in the case. Pursuant thereto the court submitted a question covering undisputed matters, and the following: "(2) Did the plaintiff furnish materials and perform work and labor in and about the erection and construction of said building, so that

the same was substantially finished before the filing of said claim for lien? (3) Did the plaintiff, at the request of the defendant *Frank C. Keller*, furnish extra materials and furnish extra work in the erection and construction of said building? (4) If you answer the last question, 'Yes,' what is the reasonable value of such extra work and materials? (5) Did the plaintiff fail to do all the work and furnish all the material required by said contract in the manner and of the quality required by the contract,— that is to say, was some of the work done and materials furnished defective and not up to the requirements of the contract? (6) If you answer the last interrogatory to the effect that some of the work was defective, in what sum do you assess the defendant's damages by reason of such defective work and materials, including the necessary time, if any, during which he was deprived of the use of the building while endeavoring to have said defects, or some of them, remedied at a reasonable expense? The jury found in the affirmative as to the first, second, third, and fifth questions, found the value of extra work and material at $63.42, and the damages for nonperformance of the contract at $275.

The court made findings in accordance with the verdict of the jury. Judgment was entered accordingly, from which this appeal was taken by defendants.

J. M. Clarke, for the appellants.

For the respondent the cause was submitted on the brief of *Fiebing & Killilea.*

MARSHALL, J. The first proposition of appellants' counsel is that, the fact being established by the verdict that the contract was not fully performed by plaintiff, the conclusion of law that he was entitled to recover is erroneous. The principle invoked is that where a contract provides for payment of a specified sum for constructing a building, payable upon its completion, full performance is a condition prece-

dent to a recovery thereon, and without proof of such performance, or of acceptance of the building or appropriation of the work done under the contract, equivalent to a partial acceptance, the contractor cannot recover on the contract or *quantum meruit*. *Moritz v. Larsen*, 70 Wis. 569. That does not apply to the facts of this case. Here the contract provided that, on failure of the contractor to fully perform the contract to build the building, the owner might take possession thereof and complete it at such contractor's expense. Such provision takes the contract out of the rule mentioned by expressly providing for a partial acceptance and deduction for nonperformance. Defendant *F. C. Keller* asserted his rights under such provision. He took possession of the building when plaintiff abandoned the work, and finished it, in substantial compliance with the contract, by the early part of January, 1893, and before the action was commenced. That appears by his own evidence. Under such circumstances, the law is that the contractor may recover the contract price, less the reasonable cost of completing the building so far as the same could be done practicably, the damage by delay, and the diminished value when completed because of defects not remediable without unreasonable expenditure. *Pinches v. Swedish Evang. Luth. Church*, 55 Conn. 183; *Crouch v. Gutmann*, 134 N. Y. 45; *White v. Braddock Borough School Dist.* 159 Pa. St. 201, cited by respondent's counsel; also Lloyd, Building, § 26; *Wells v. Board of Education*, 78 Mich. 260; *Charlton v. Scoville*, 144 N. Y. 691; *Van Dorn v. Mengedoht*, 41 Neb. 525.

Error is assigned on the finding of the jury that the building was substantially completed before the lien was filed. Whether such finding was warranted by the evidence or not is immaterial. It follows, from what has preceded, that plaintiff is entitled to recover the contract price, less deductions for expense of remedying the defects, so far as that was practicable without unreasonable expense, and for the

other damages sustained, if any. This finding is challenged upon the theory of appellants' counsel that if the building was not substantially completed according to contract, by the plaintiff, he cannot recover at all. We hold against that proposition; hence the materiality of the finding disappears.

Error is assigned on the instructions respecting the sixth question, which covers the deductions from the contract price to which appellant was entitled for failure of plaintiff to fully complete the building; but, as no exceptions to the charge were preserved in the bill of exceptions, we must presume that the jury was correctly instructed. It appears that evidence in the record supports all the findings of fact as made by the jury, not heretofore referred to; that such findings cover all the issues of fact in the case; that judgment was entered in accordance therewith; and that there are no reversible errors.

By the Court.—The judgment of the circuit court is affirmed.

VORBRICH, by guardian *ad litem*, Respondent, vs. GEUDER & PAESCHKE MANUFACTURING COMPANY, Appellant.

April 30 — May 21, 1897.

Master and servant: Injury to minor: Assumption of risk: Court and jury: Unexpected movement of machine: Presumption of negligence from happening of accident: Freedom of machine from discoverable defects: Evidence.

1. In an action to recover for injuries received by a boy fifteen years old while engaged in operating a machine in defendant's factory about which he had had more or less experience, the question whether the plaintiff assumed the risks arising from defects in the machine, by continuing in the employment knowing of such defects, is *held* to have been for the jury.
2. Per MARSHALL, PINNEY, and NEWMAN, JJ. Although, in an action for personal injuries alleged to have been caused by the unex-

pected revolution of a stamping machine, operated by touching a pedal which engaged, by means of a clutch, a wheel on a revolving shaft, the testimony of the plaintiff that the machine made such an unexpected revolution the day before, and also at the time of, the accident, and the testimony of another witness that he subsequently saw it do the same thing when there was no one near it, might raise a presumption of negligence as matter of law, such presumption would be overcome by conclusive proof that the machine was free from all discoverable defects.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas.*

For the respondent there was a brief by *Fiebing & Killilea*, attorneys, and *C. H. Van Alstine*, of counsel, and oral argument by *Mr. Van Alstine.*

CASSODAY, C. J. It appears from the record: That the plaintiff was employed by the defendant to work in its factory about the 1st of September, 1893. That prior to that time he had been engaged in working upon similar, but smaller, machines. That upon going to work for the defendant he worked upon two or three smaller machines before working upon the machine by which he was injured, which was No. 2. That that machine consisted of a die or punch, which was caused to be set in motion by the operator pressing his foot upon the treadle; the result of which was to engage, by means of a clutch, a wheel upon the main shaft, and which was in constant motion. That by releasing the pedal the machine would make but one revolution, causing the die or punch to make one impression. That, if the pressure of the foot was maintained, the machine would continue to revolve until the foot was removed. That in operating the machine only one revolution at a time was desirable. That the machine was so constructed that if the operator pressed his foot upon the pedal, and at once re-

leased it, one revolution would result. That October 30, 1893, he worked on that machine all day. That shortly after he commenced to work for the defendant the foreman told him that, if there was anything out of order or wrong about the machine, to see the die setter about it. That October 31, 1893, while he was working on machine No. 2, he told the die setter that his punch dropped the day before. That the die setter said to him: "Go on; attend to your own business; the machine is all right." That he then went to work at it again, and was hurt about 4 o'clock in the afternoon. That at the time he was hurt he was putting the tin in the machine, and when the punch came down and he was hurt, the tin was in the machine,— not in its right shape, though,— that is, over half of it was in, and when it cut his fingers it pulled the other half in. That three of his fingers were taken off. That when he got his fingers out of the press they were smashed all up. That the doctor cut the pieces off, and the bones were half smashed, and he had to saw the bones off too. That *at the time the punch came down and cut his fingers off his foot was not on the treadle.* That to operate these smaller machines he put his foot on the treadle. That it was necessary to apply more weight upon the treadle to cause the No. 2 machine to work than upon the smaller machine, which went still easier. That he only had to just touch the treadle, when the smaller one would come down. That upon this one he had to step pretty hard. That at the time of such injury the plaintiff lacked about six weeks of being fifteen years old. That November 29, 1893, he commenced this action by his guardian to recover damages by reason of the defendant's alleged negligence. That, issue being joined and a trial had, at the close thereof the jury returned a special verdict to the effect that at the time of the plaintiff's injury the said machinery was so out of repair as to render said stamp or punch liable to descend without pressure upon

the treadle; that such want of repair was the proximate cause of the plaintiff's injury; that defendant had notice of such want of repair before the plaintiff's injury; that the defendant was guilty of a want of ordinary care, which was the proximate cause of the plaintiff's injury; that plaintiff, taking into account his age, experience, and capacity, was not guilty of any want of ordinary care which proximately caused or contributed to his injury; that the plaintiff is entitled to damages, which they assessed at $2,500. That thereupon judgment was ordered to be entered upon the verdict accordingly, and from the judgment so entered the defendant brings this appeal.

It is claimed that the defendant was negligent in that (1) it put the plaintiff at work upon the machine in question when it knew, or in the exercise of ordinary care ought to have known, that it was so defective or out of repair as to render the die, stamp, or punch liable to descend without pressure upon the treadle; and (2) also in putting a boy of his age and experience to work upon such a machine, and without instructing him as to the risks and dangers incident to such employment.

1. The first of these questions seems to be very important in the case, but was discussed very little at the bar, and less in the briefs. There is undoubtedly a class of cases where the facts are such that the mere proof of the accident creates a presumption of negligence. *Byrne v. Boadle*, 2 Hurl. & C. 722; *Scott v. London & St. K. Docks Co.* 3 Hurl. & C. 596; *Briggs v. Oliver*, 4 Hurl. & C. 403; *Kearney v. L., B. & S. C. R. Co.* L. R. 5 Q. B. 411; *S. C.* L. R. 6 Q. B. 759; *Mullen v. St. John*, 57 N. Y. 567; *McCarragher v. Rogers*, 120 N. Y. 526; *Volkmar v. Manhattan R. Co.* 134 N. Y. 418; *Hogan v. Manhattan R. Co.* 149 N. Y. 23; *Lyons v. Rosenthal*, 11 Hun, 46; *Morton v. D., B. C. & A. R. Co.* 81 Mich. 423; *Thomas v. W. U. Tel. Co.* 100 Mass. 156; *Connors v. Durite Mfg. Co.* 156 Mass. 163; *Donahue v. Drown*, 154 Mass. 21;

Martineau v. Nat. Blank Book Co. 166 Mass. 4; *Dixon v. Pluns*, 98 Cal. 384; *Judson v. Giant Powder Co.* 107 Cal. 549; *S. C.* 29 L. R. A. 718; *Howser v. C. & P. R. Co.* 80 Md. 146; *S. C.* 27 L. R. A. 154. This court has repeatedly sanctioned the same principle. *Spaulding v. C. & N. W. R. Co.* 30 Wis. 110; *Cummings v. Nat. Furnace Co.* 60 Wis. 603; *Kurz & Huttenlocher Ice Co. v. M. & N. R. Co.* 84 Wis. 171; *Stacy v. M., L. S. & W. R. Co.* 85 Wis. 225. In such cases the accident is unusual under the circumstances. In most of these cases there was, in fact, present some specific defect, act, or omission as the basis of the alleged negligence, and the thing or machine was under the management or control of the defendant; but in some of them the machine unexpectedly started, with no one present or in control but the person who was injured. In some of the cases the defendant gave evidence of a careful inspection by competent experts, without discovering the defect; but such evidence was held to be insufficient to take the case from the jury. No one would claim, as a general rule, that the mere proof of an accident creates any presumption of negligence.

There is a class of cases holding that, even where the facts are such as to create such presumption, yet that it is completely overcome, as a matter of law, by merely proving by competent experts that the machine or thing at the time was not defective, or out of repair, or that the conditions were such as to preclude negligence. *Spaulding v. C. & N. W. R. Co.* 30 Wis. 110; *S. C.* 33 Wis. 582; *Read v. Morse*, 34 Wis. 315; *Gibbons v. W. V. R. Co.* 62 Wis. 546; *Menominee River S. & D. Co. v. M. & N. R. Co.* 91 Wis. 447; *Dingley v. Star Knitting Co.* 134 N. Y. 552; *Brymer v. S. P. R. Co.* 90 Cal. 496; *Duffy v. Upton*, 113 Mass. 544; *Ross v. Pearson Cordage Co.* 164 Mass. 257. In this last case it was held that "where a person is injured by the sudden starting of a machine which he is cleaning, if there is no defect in the machine, and it does not differ from similar machines in use

elsewhere, and is in the same condition as it was when he entered upon his employment, the mere fact that certain contrivances, if on the machine, might have prevented its starting, is not sufficient to show a breach of duty on the part of his employer."

Since we find both classes of cases in the same court, and sometimes in the same volume (*Volkmar v. Manhattan R. Co.* 134 N. Y. 418; *Dingley v. Star Knitting Co.* 134 N. Y. 552), it is manifest that the class to which the case at bar belongs must depend upon the particular facts involved. As the evidence may be different upon a new trial, we refrain from determining the question suggested upon this appeal.

2. Upon the question of the assumption of risk, counsel for the plaintiff suggested an instruction, whereupon the court ruled and stated in presence of the jury, and in part to them, that: "I have not instructed the jury upon that point, and I do not consider that it is a question proper to instruct the jury upon. It might be claimed in the case of a full-grown man — a man with all his faculties — that it was negligence on his part to continue in the employment after he had discovered the danger, but I think that in the case of a boy of this age, with his experience and his capacity, I ought not to submit that question to the jury. . . . In this case, this is a minor. He was not employed as an independent agent but as a minor; and I do not think that it is competent to submit, even to the jury, the consideration of the question whether or not he accepted this risk by continuing in this employment. That question has not been submitted to you by the court, and the court declines to submit it. You will answer the questions which have been submitted by the court under the instructions I have given you, and not outside of them." This ruling is contrary to numerous decisions of this court. We only cite two: *Luebke v. Berlin Machine Works*, 88 Wis. 442; *Casey v. C., St. P., M. & O. R. Co.* 90 Wis. 113. In the first of these cases it was

held that "it is a question of fact for the jury whether a minor servant was of sufficient age, intelligence, discretion, and judgment to bring him within the operation of the rule applicable to adults, by which knowledge of open and obvious defects and dangers is imputed to them, and they are held to assume the risk incident thereto if they continue in the employment." The plaintiff appears to have had more or less experience, and the question of his assumption of risk was properly for the jury.

There are other portions of the charge subject to criticism, but, as they are not likely to be repeated, it is unnecessary to specifically consider them.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

MARSHALL, J. (PINNEY and NEWMAN, JJ., concurring). With the decision that the judgment of the circuit court must be reversed and a new trial granted, all concur, but on the question of whether there was sufficient evidence to warrant the court in submitting the case to the jury differences exist of such a character as to render it necessary that a separate opinion be filed on one branch of the case.

The evidence is undisputed that there was no discoverable defect in the construction of the machine, or in its repair, at the time of the accident. It was of the same construction as machines ordinarily used and found safe for the business for which it was designed. The boy testified that it made an unexpected revolution the day before he was injured, without any pressure being put upon the pedal; that it started from a state of rest without any such pressure, and revolved once, at the time of the accident; and one witness testified to seeing it subsequently do the same thing when no one was near it. But the evidence of those who worked with the machine for a long time prior to the time the boy commenced working, and who worked with it for a long time

after the injury, was to the effect that the machine had always worked perfectly. The testimony was undisputed that the mechanical arrangement was such that its motions were necessarily absolute and positive, depending wholly on pressure upon and release of the pedal. From this state of the record, giving to the plaintiff's evidence the most favorable construction it will reasonably bear, including all reasonable inferences therefrom, would it warrant a jury in finding that the machine, though free from all discoverable defects, was out of repair, nevertheless, and that the defendant ought to have known of it and to have apprehended that a personal injury to the plaintiff might probably result therefrom? That is the question.

In our opinion, the question stated in the preceding paragraph must be answered in the negative; that it will not, consistent with settled principles, admit of any other answer; and that, when the authorities bearing on the subject are carefully considered, no conflict will be found, either in the adjudications of this court or elsewhere.

There are many cases that hold that an unexplained accident with a machine, not liable to occur if such machine was properly constructed and in a proper state of repair, is evidence of negligence; as in *Spaulding v. C. & N. W. R. Co.* 30 Wis. 110, where it was held that the escape of fire from a passing locomotive engine, sufficient to cause damage, raised a presumption of improper construction or insufficient repair or negligent handling of such engine. To the same effect are *Cummings v. Nat. Furnace Co.* 60 Wis. 603; *Kurz & Huttenlocher Ice Co. v. M. & N. R. Co.* 84 Wis. 171; *Stacy v. M., L. S. & W. R. Co.* 85 Wis. 225; *Mullen v. St. John*, 57 N. Y. 567; *Volkmar v. Manhattan R. Co.* 134 N. Y. 418; *McCarragher v. Rogers*, 120 N. Y. 526, and many others that might be cited. Such cases lay down a very well recognized principle in the law of negligence, but do not reach the question here under discussion, and do not conflict in the slightest degree with

numerous authorities that go on another principle, just as well recognized and firmly established, to the effect that undisputed proof of freedom of the machine from all discoverable defects, either in construction or repair, effectually overcomes any mere inference or presumption arising from the happening of the accident, so as to leave no question in that regard for the jury; as in *Spaulding v. C. & N. W. R. Co.* 33 Wis. 582, where this court held the inference that a locomotive engine was defective, arising merely from the escape of fire therefrom sufficient to cause damage, rebutted by conclusive proof that the engine was free from discoverable defects, so as to leave nothing on that point for the consideration of a jury. Also, to the same effect, are *Read v. Morse*, 34 Wis. 315, and *Gibbons v. W. V. R. Co.* 62 Wis. 546.

The decisions along this line in this court, reaching from an early day to the present, are believed to be without conflict, and, if like harmony does not exist elsewhere,— which we do not admit,— a decision of the question at this time should not be of a nature to create doubt respecting the rule that obtains here. In the recent case of *Menominee River S. & D. Co. v. M. & N. R. Co.* 91 Wis. 447, this court, in an exhaustive opinion by Mr. Justice PINNEY, went over the whole ground, collating and commenting on substantially all the important adjudications in this court, and reaffirmed without exception the doctrine that, where negligence arises as a presumption of fact from the happening of an accident with machinery,— not a mere inference to be drawn by the jury, but a presumption so convincing and persuasive that, unexplained or unrebutted, it *prima facie* establishes the alleged negligence,— such presumption is, nevertheless, overcome by conclusive proof that the machine was free from discoverable defects, so as to take the question in that regard from the jury. To the same effect is the still more recent case of *Badger v. Janesville Cotton Mills*, 95 Wis. 599, where an operative, who was standing on a ladder endeavoring to

remove a belt from a rapidly revolving shaft, was caught by the arm, carried around the shaft, and severely injured. He claimed that the ladder was defective, that it broke by his weight upon it, and that thereby he was caused to make a movement which resulted in his arm being caught, with the result mentioned. There was positive proof that the ladder was free from all discoverable defects, and on that the trial court nonsuited the plaintiff, and this court sustained the ruling upon the ground, among others, that in the face of positive proof that the ladder was free from any defect that any one could point out, the evidence of plaintiff that it broke by his weight upon it was not sufficient to send the question to a jury.

If time would permit, what has preceded could be reinforced by numerous other citations from courts of the highest respectability; but, aside from *Menominee River S. & D. Co. v. M. & N. R. Co.*, *supra*, probably no stronger or more satisfactory case can be found upon which to rest the decision of this court than *Dingley v. Star Knitting Co.* 134 N. Y. 552, for in its leading facts it is in all respects like the case under consideration. The injured person was a young boy. The machine was a breaker or card in a cotton mill, operated by a belt from a pulley on the main shaft to a tight pulley on the breaker. At the side of the tight pulley was a loose pulley. When the card was idle and the main shaft in motion, the belt was on the loose pulley; otherwise the belt was on the tight pulley. The method of starting the card was to press the belt, by hand, from the loose pulley to the tight pulley, and of stopping it, to press the belt back to its former position. On the day in question the boy claimed that he pressed the belt to its place on the loose pulley, and stopped the card; that he then reached under the machine to do some cleaning, as was his duty to do; and that while so doing the machine unexpectedly started, and he was severely injured. The boy testified, as

in this case, that the machine had operated that way once or twice before, and there was evidence on the part of plaintiff, as here, that on some other occasion the same thing had occurred. The proof showed that there were no discoverable defects; that the machine was the same as usually used and found safe against such accidents; and that it was operated a long time before and a long time after the occurrence in question without the happening of any such accident. The court held that, even if it were true that the machine had started unexpectedly, there was no warrant for saying that the defendant was negligent in respect to keeping it in repair, in the face of the undisputed evidence in respect to there being no defects that any one could point out; that to hold otherwise would be to extend the liability of the master beyond any bounds known to the law, and without any reason to support it. It is significant that the court further held, in effect, that the starting of the machine unexpectedly, after the belt was properly shifted to the loose pulley, was an occurrence so improbable that the evidence of the boy that it did so start not only did not warrant a finding in plaintiff's favor on that point, but the legitimate inference from the whole case was that the belt was not properly shifted, and that neglect in that regard caused the mischief, and explained it all. That is in line with *Cummings v. Nat. Furnace Co.* 60 Wis. 603, where it was held, in effect, that proof that the machine was free from defects left the happening of the accident evidence of improper handling; and with *Badger v. Janesville Cotton Mills*, 95 Wis. 599, where it was held that proof that the ladder was free from defects left it so improbable that it broke from plaintiff's weight upon it as to effectually overcome his evidence that it did so break, and that where the probabilities from unmistakable physical facts are all one way, a jury has no right to say the truth is the other, because there is evidence from the mouth of a witness to that effect, especially where such witness is

an interested party. See, also, to the same point, *Groesbeck v. C., M. & St. P. R. Co.* 93 Wis. 505; *Lenz v. Whitcomb, post*, p. 310; *Payne v. C., R. I. & P. R. Co.* 39 Iowa, 523; *Artz v. C., R. I. & P. R. Co.* 34 Iowa, 153; *Bloomfield v. B. & W. R. Co.* 74 Iowa, 607.

Further, on the main question we call attention to *Redmond v. Delta L. Co.* 96 Mich. 545, as directly in point. There a person was injured by an unexpected failure to operate of an endless log chain, which was controlled by pressing upon a lever to start, and releasing the lever to stop, it, as occasion required. On the occasion in question plaintiff claimed that the chain failed to respond to a release of the lever. The proof was that no defect existed in the apparatus that could be discovered or pointed out, and that the machine responded promptly to the manipulation of the lever before and after the accident. Counsel for plaintiff contended that the jury were warranted in finding that the failure of the machine to operate as usual at the time of the injury was owing to some defect therein. The court held to the contrary, and that a finding on counsel's contention would be based on mere surmise and conjecture that there was negligence somewhere; that if that were permissible, some of the fundamental principles of the law of negligence would be done away with; that where an employee seeks compensation from the master for injuries received in the latter's employment, he must trace it to some fault of the master,— to some distinct failure of duty. See, also, *Louisville & N. R. Co. v. Binion*, 98 Ala. 570; *Davidson v. Davidson*, 46 Minn. 117; *Brymer v. S. P. R. Co.* 90 Cal. 496; *Morton v. D., B. C. & A. R. Co.* 81 Mich. 423.

The preceding are not in conflict with *McCarragher v. Rogers, supra*, as expressly stated by the judge who wrote the opinion in *Dingley v. Star Knitting Co., supra;* nor are they with *Volkmar v. Manhattan R. Co., supra*, where the negligence charged was failure to keep a railway track in

repair. The question of negligence was held to be for the jury for want of conclusive proof to overcome the inference of negligence arising from the physical facts. Neither is *Dingley v. Star Knitting Co., supra*, nor the principle here applied, in conflict with *Connors v. Durite Mfg. Co.* 156 Mass. 163, where the accident was caused from the unexpected movement of an engine caused by a leaky valve, or with *Martineau v. Nat. Blank Book Co.* 166 Mass. 4, where a machine started by the unexpected slipping of a belt from a loose to a tight pulley, as in the *Dingley Case*, the difficulty being traced by evidence to a defective belt and a defective pulley, as the producing cause.

The foregoing sufficiently shows the substantial harmony existing to the effect that while, in a class of cases mentioned, an accident may be of such a character as to evidence negligence, and the inference in that regard may be so strong as to amount to a presumption of fact, not open to consideration by a jury unless explained or rebutted so as to throw doubt on the question, yet, when such inference or presumption arises from physical facts alone and points to insufficiency in the construction or repair of machinery as the producing cause of the accident, conclusive proof that such machinery was free from all discoverable defects will wholly overcome it, and leave no legitimate basis for a finding of defectiveness which the owner ought to have discovered, and reasonably to have apprehended a personal injury might probably occur to some person whose personal safety ordinary care required him to guard.

The principle here discussed we deem definitely established, as are substantially all principles pertaining to the law of negligence, the same as in any other branch of the law, civil or criminal. Such principles are not, as is sometimes supposed, largely indefinite, indefinable, and easily bent to suit the exigencies of particular cases. Cases do not make the law. Whether principles of law apply to a

particular case depends upon the facts of such case, but that is no more true in the law of negligence than in the law of criminal homicide, or any other branch of jurisprudence.

From the foregoing, while fully concurring that the judgment of the circuit court should be reversed for all the grounds stated in the opinion of the chief justice, we think that there was not sufficient evidence of negligence respecting the suitableness of the machine to take the case to the jury on that point.

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NE-PEE-NAUK CLUB, Appellant, vs. WILSON and others, Respondents.

May 1 — May 21, 1897.

Waters: Riparian rights: Hunting and fishing.

1. By the expansion of a small stream a shallow body of water from thirty-five to sixty-five rods in width and about three miles long was formed, through which there was little or no current during the greater part of the year. In summer the rushes and wild rice grew luxuriantly and the surface was interspersed with mud, marsh, and bog, leaving small openings of clear water but no regular channel. In ordinary stages of water it was navigable only by small canoes and skiffs. It had been meandered by the government surveyors, and was referred to in the field notes as a "lake" or "marsh." *Held*, that it was not a watercourse but a lake, and hence that the title of the riparian owners stopped at the water line.
2. Riparian owners upon a lake, the soil under which belongs to the state, have no exclusive right to hunt and fish upon its waters.

APPEAL from a judgment of the circuit court for Green Lake county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

The action is in equity to restrain trespass to lands. The plaintiff claims to be the owner of certain lands in the county of Green Lake, which border upon a shallow body of water or marsh popularly known as "Mud Lake." It claims, by

virtue of such riparian ownership, to be the owner of Mud Lake itself. The lands under Mud Lake are valuable only for the privilege which the lake affords for fishing and the hunting of wild fowl, and for such exercise and recreation. The lake is shallow, so that the lands are in the nature of marsh or swamp lands. In the summer time they produce large crops of wild rice and other vegetation, making a natural resort for wild fowl for a nesting and feeding ground. The plaintiff desired to keep this as a private preserve for a shooting ground and place of recreation for its members and guests. The defendants had at various times, for several years, hunted wild duck and other water fowl upon this lake, and asserted the right and purpose of continuing to do so in the future. The action was brought to restrain them from doing so.

The question controverted is the title to the lands under Mud Lake,—whether the plaintiff owns them by virtue of riparian ownership, or whether the title is in the public. This depends on whether Mud Lake is a watercourse or a meandered lake. It varies in width from thirty-five rods to sixty-five rods, and is about three miles in length. In spring and fall and after heavy rains, the whole surface is covered with water. In summer much of the water disappears, leaving some considerable expanses of water interspersed with mud, marsh, and bog. In the places which are covered by water, rushes and wild rice grow luxuriantly. There are small openings of clear water, but no regular channel anywhere, except at a place called the "Narrows," below the point where the alleged trespasses were committed. In ordinary stages of water it was navigable only by small craft, like canoes or hunting skiffs, propelled by paddles or push poles. What is called "Mud Lake" is formed by the expansion or dispersion of the waters of a small stream called "Grand River." After the Grand river enters into and becomes Mud Lake, it follows no defined channel, but distrib-

utes itself through the marsh, and appears again as a stream only at or near the point called the "Narrows." Mud Lake is in fact, for the most part, a low, wet marsh, producing a large growth of wild rice and other vegetation, and unnavigable by any natural channel, by any kind of boat, through its entire length, during the greater portion of the year. The lands bordering upon it were meandered by the government surveyors. In the field notes it was referred to as a "lake" or "marsh."

The court found that Mud Lake is a meandered lake, and that the title to the lands under it is in the public and not in the plaintiff, and dismissed the complaint, with costs against the plaintiff. The plaintiff appeals.

For the appellant there was a brief by *Bashford, O'Connor & Aylward*, and oral argument by *R. M. Bashford*. They contended, *inter alia*, that the widespread of Grand river at the place where the alleged trespasses were committed is not a lake, but is a stream or watercourse. *Case v. Hoffman*, 84 Wis. 438; *Spelman v. Portage*, 41 id. 144; *Hoyt v. Hudson*, 27 id. 656; *Fryer v. Warne*, 29 id. 511; *Eulrich v. Richter*, 37 id. 226; *Mohr v. Gault*, 10 id. 513; *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569; *Hilliker v. Coleman*, 73 Mich. 170; *Rummell v. Lamb*, 100 id. 424; *Pyle v. Richards*, 17 Neb. 180; *Morrissey v. C., B. & Q. R. Co.* 38 id. 406; *Rigney v. Tacoma L. & W. Co.* 26 L. R. A. 425, 9 Wash. 576; Gould, Waters, §§ 4, 41, 263, 264; 28 Am. & Eng. Ency. of Law, 944–946; *West v. Taylor*, 16 Oreg. 165; *Montgomery v. Locke*, 72 Cal. 75; *Macomber v. Godfrey*, 108 Mass. 219; *Hinkle v. Avery*, 88 Iowa, 47; *Gillett v. Johnson*, 30 Conn. 180; *Shields v. Arndt*, 4 N. J. Eq. 234; *Mitchell v. Bain*, 142 Ind. 604; *Lambert v. Alcorn*, 144 Ill. 313; *Peck v. Herrington*, 109 id. 611; *Fuller v. Shedd*, 161 id. 462; *Potter v. Howe*, 141 Mass. 357; *Palmer v. Waddell*, 22 Kan. 352; *Missouri P. R. Co. v. Keys*, 55 id. 205; *Crawford v. Rambo*, 44 Ohio St. 279; *Byrne v. M. & St. L. R. Co.* 38 Minn. 212;

Luther v. Winnisimmet Co. 9 Cush. 171; *Morrison v. B. & B. R. Co.* 67 Me. 353. If, however, the widespread is in fact a lake and not a watercourse then the plaintiff had an exclusive right to hunt and fish thereon as an incident to its ownership of the surrounding lands bordering on its waters, the body of water not being navigable in fact. *Hardin v. Jordan*, 140 U. S. 371; *Bristow v. Cormican*, 3 App. Cas. 641; *Beckman v. Kreamer*, 43 Ill. 447; *Freary v. Cooke*, 14 Mass. 488; 2 Bl. Comm. 39, 40; 3 Kent, Comm. 409–418; *Comm. v. Chapin*, 5 Pick. 199; *Hooker v. Cummings*, 20 Johns. 90; *Deuterman v. Gainsborg*, 9 App. Div. 151; *Cobb v. Davenport*, 32 N. J. Law, 369; *Sterling v. Jackson*, 69 Mich. 488; *People v. Silberwood*, 67 N. W. Rep. 1087; *State v. Shannon*, 36 Ohio St. 423; *Lembeck v. Nye*, 47 id. 336; *Chisolm v. Caines*, 67 Fed. Rep. 285; Gould, Waters, §§ 183, 230; *Santa Paula Water Works v. Peralta*, 113 Cal. 38; *New England T. & S. Club v. Mather*, 68 Vt. 338; *Boorman v. Sunnuchs*, 42 Wis. 233; *Reysen v. Roate*, 92 id. 543; *Priewe v. Wis. State L. & I. Co.* 93 id. 534. The act of trespass threatened by the defendants would result in an irreparable injury to the plaintiff's property, for the uses and purposes for which it is held, as is shown by the particular allegations of fact made in the complaint and by the testimony offered on the trial. *Wilson v. Mineral Point*, 39 Wis. 160; *Trustees of German Evang. Cong. v. Hoessli*, 13 id. 348; *Lutheran Evangelical Church v. Gristgau*, 34 id. 328; *Neshkoro v. Nest*, 85 id. 126; *Eau Claire v. Matzke*, 86 id. 291; *Gause v. Perkins*, 3 Jones Eq. 177; *Powell v. Cheshire*, 70 Ga. 357; *Mayor, etc. of Frederick v. Groshon*, 30 Md. 436, 445; *Haines v. Hall*, 17 Oreg. 165; *Hillman v. Hurley*, 82 Ky. 626; *Shipley v. Ritter*, 7 Md. 408; *Puckette v. Hicks*, 39 La. Ann. 901; *Crescent City L. S. L. & S. H. Co. v. Police Jury*, 32 id. 1192; *Mooney v. Cooledge*, 30 Ark. 640, 642; *Rigney v. Tacoma L. & W. Co.* 26 L. R. A. 425; *Lembeck v. Nye*, 47 Ohio St. 336.

The fact that the defendants are pecuniarily irresponsible is further ground for the interposition of a court of equity to enjoin trespass. 2 Story, Eq. Jur. § 928; *Hanly v. Watterson*, 39 W. Va. 214; *Gause v. Perkins*, 3 Jones Eq. 177; *Musselman v. Marquis*, 1 Bush, 463; *Hillman v. Hurley*, 82 Ky. 626; *Lembeck v. Nye*, 47 Ohio St. 336; *Milan Steam Mills v. Hickey*, 59 N. H. 241; *Owens v. Crossett*, 105 Ill. 354; *Britton's Adm'r v. Hill*, 27 N. J. Eq. 389; *Martin v. Davis*, 96 Iowa, 718; *Wilson v. Hill*, 46 N. J. Eq. 367. The injunction should issue in order to prevent a multiplicity of suits. *Pride v. Weyenberg*, 83 Wis. 59; *Musselman v. Marquis*, 1 Bush, 463; *Ellis v. Wren*, 84 Ky. 254; *Hillman v. Hurley*, 82 id. 626; *John A. Roebling Sons' Co. v. First Nat. Bank*, 30 Fed. Rep. 744; *Lembeck v. Nye*, 47 Ohio St. 336; *Mills v. New Orleans Seed Co.* 65 Miss. 391; *Owens v. Crossett*, 105 Ill. 354; *Shaffer v. Stull*, 32 Neb. 94; *Wilson v. Hill*, 46 N. J. Eq. 367; 1 High, Injunctions, § 12; 1 Pomeroy, Eq. Jur. § 245; 3 id. § 1357.

For the respondents there was a brief by *Bouck & Hilton*, and oral argument by *Gabe Bouck*.

NEWMAN, J. The only question in the case is whether the so-called "Mud Lake" is a natural, permanent, inland body of water, such as is not properly a watercourse, and meandered by the government surveyors; for, if it is a natural inland body of water which is not properly a watercourse, the title of the riparian owner stops at the water line, and the title to the land which is under the water is in the state. This court has laid down one rule for running water, and another for lakes and ponds. In the former case the riparian owner owns to the thread of the current; in the latter, to the water line. And no distinction has been made on account of the size of either stream or pond. It is unimportant if the common law, as related to the title to lands under lakes and ponds, was different. It is merely a ques-

tion of local law. Grants by the United States of lands bounded by lakes and streams are to be construed and given effect according to the law of the state in which the lands lie. And each state determines for itself to what extent it will retain and exercise its prerogative over lands under such streams and bodies of water. *Hardin v. Jordan*, 140 U. S. 371; *McLennan v. Prentice*, 85 Wis. 427.

It is well settled in this state that grants by the United States, of lands bounded by a meandered lake or other permanent body of water, convey title only to the natural shore of the body of water, while the title to the land which is under the water is in the state. *Diedrich v. N. W. U. R. Co.* 42 Wis. 248. And the rule is the same whether the body of water can be made practically useful for the purposes of navigation or not (*Boorman v. Sunnuchs*, 42 Wis. 233), irrespective of its size or depth.

It is undisputed that Mud Lake was meandered by the government surveyors. It is clear that it is an inland body of water of permanent character. While it might with entire propriety and accuracy be called a marsh or swamp, the name by which it shall be designated is not controlling upon the question of the title to its bed. It has very little, if any, movement of its water from its head towards its outlet during the greater part of the year. It is said that the controlling distinction between a stream and a lake or pond is that in the one case the water has a natural motion,— a current,— while in the other the water is, in its natural state, substantially at rest; and this entirely irrespective of the size of the one or the other. But not every sheet of water in which there is a current from its head towards its outlet is therefore a stream. Angell, Water Courses, 6th ed. (Perkins), § 4f. It is said that even the large lakes have such a current. The trial court found that this was not a stream or watercourse, but was a "shallow, muddy lake or marsh." Such it is clearly shown to be by the evidence.

The plaintiff does not own the lake or the soil under it. It is owned by the state. The right of fishing and fowling upon such waters is in the owner of the soil which is under the water. *Hardin v. Jordan*, 140 U. S. 371; 8 Am. & Eng. Ency. of Law, 31; 3 Am. & Eng. Ency. of Law, note on p. 166, and cases cited; Washb. Easem. *410; *Bristow v. Cormican*, 3 App. Cas. 641. In this case it is in the public, which has not in any way granted its right to the plaintiff. The plaintiff's right to hunt and fish over this lake was equal to, but not superior to, the right of either defendant. It had no cause of action against the defendants. Its complaint was properly dismissed on the merits.

By the Court.—The judgment of the circuit court is affirmed.

On the question of the ownership of the bed of lakes and ponds, see a note to *Gouverneur v. National Ice Co.* (134 N. Y. 355), in 18 L. R. A. 695.—REP.

GORR, Respondent, vs. MITTLESTAEDT, Appellant.

May 1—May 21, 1897.

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Dangerous place near traveled way: Liability of owner of premises for injuries: Intervening space.

1. If there is a substantial space between the boundaries of a traveled way and a dangerous place on adjoining land, so that to reach such place a traveler must necessarily wander from or pass wholly outside of such way and become a trespasser, the owner of the premises is not liable for injuries to a traveler sustained by reason thereof.
2. Thus, where a private driveway, twelve feet wide, with well-defined boundaries, is situated over twenty feet from a cellar, the intervening space being occupied by a grass plot and piles of stone extending from the ends of the cellar nearly to the driveway, the owner of the premises is not liable for injuries received by a person traveling on the driveway by invitation, whose horse became unmanageable and caused the carriage to wholly leave the driveway and pass over the grass plot to the cellar.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

The defendant owned three lots on the west side of Main street in the city of Oshkosh. On the south side of the lots was an open cellar forty-five feet wide toward the street line, and extending west sixty-five feet. North of the cellar some distance, and back from the street, was a dwelling house. Back of the cellar was an office used by the defendant, and still further back was a large barn. On the side of the excavation toward the north there was no barrier, except that the wall extended above the surface of the ground about one foot. The house was occupied by a tenant by the name of Menz, with his family. From the street, north of and parallel with the cellar, and twenty to twenty-six feet from it, was a private driveway extending back to the barn. Such driveway was about twelve feet wide, and was used in going from the street to the house; also to the office and barn on the premises. Such way was for the use of all persons desiring to call at the office or to visit the Menz family. It was frequently used by the plaintiff before the accident, by invitation of the Menz family.

On the day of the accident there was a funeral at the house. Crape was hanging on the door. Plaintiff, pursuant to an invitation, express or implied, in a carriage drawn by one horse, drove up such private way to a point near the house, and was about to alight, when the horse became frightened, presumably by the crape on the door, causing him to back up, turn the buggy towards the cellar, and to continue to back till the vehicle, its occupants, and the horse, were precipitated into the excavation. The horse was so injured as to be worthless, the buggy was considerably damaged, and the plaintiff suffered some personal injuries. She brought this action to recover compensation therefor.

At the close of the evidence defendant's counsel moved for a nonsuit, which was refused. A special verdict was

rendered to the effect that defendant was guilty of negligence which was the proximate cause of the injury; that plaintiff, when injured, was on the premises by invitation, was free from contributory negligence, and that her damages were $200. Defendant's counsel moved the court to set aside the verdict and for a new trial, which was denied. Both sides then moved for judgment. Defendant's motion was denied, and plaintiff's granted. Judgment was thereupon entered in plaintiff's favor, from which this appeal was taken.

James Freeman, for the appellant.

F. W. Houghton, for the respondent.

MARSHALL, J. The jury having found as a fact that plaintiff was using the private driveway, at the time of the accident, by invitation, the rule that where a licensee is injured by falling into an excavation on the land of another, over which he is passing by mere permission of such other, the licensor is not liable, does not apply. Actionable negligence springs from a violation of some positive duty which the person charged therewith owes to the injured person. In case of a mere permission by one for another to use his premises, no duty to guard the latter from danger of personal injury exists. Such permission only gives a right to enjoy the premises for such use as the licensee finds them. *Cahill v. Layton*, 57 Wis. 600; *Truax v. C., St. P., M. & O. R. Co.* 83 Wis. 547; *Dowd v. C., M. & St. P. R. Co.* 84 Wis. 105; *Peake v. Buell*, 90 Wis. 508. But where the owner of land invites another expressly or by implication to come upon his land, as by passing over a private way thereon, a different rule applies. He owes to such other the positive duty to use ordinary care to maintain such way in a reasonably safe condition for such use by persons in the exercise of ordinary care. Says the present chief justice, in *Peake v. Buell*, *supra*, quoting with approval from the opinion in the leading case of *Beck v.*

Carter, 68 N. Y. 283: "'Where the owner of land, expressly or by implication, invites others to come upon his land, if he permits anything in the nature of a snare to exist thereon, which results in injury to one availing himself of the invitation, and who at the time is exercising ordinary care, such owner is answerable for the consequences.'" "But," continues the learned judge who delivered the opinion in *Beck v. Carter*, "if, however, he gives but a bare license or permission to cross his premises, the licensee takes his risk of accident in using the premises in the condition in which they are." Under the facts of this case the defendant could not, consistent with the duty he owed to plaintiff, leave a dangerous excavation unguarded in such close proximity to the private driveway as to render it unsafe for persons to use, in the exercise of ordinary care, without being responsible for injuries happening to such persons so using the same, by reason of such neglect.

It is claimed on the part of appellant that the driveway was so far removed from the side of the open cellar that the trial court should have directed a verdict in his favor upon the ground that, as a matter of law, the distance was too great to admit of a finding that it was in such close proximity to the driveway as to render it unsafe. Ordinarily, whether a way is so rendered unsafe is a question for the jury, but the distance of the dangerous place from the course of travel, and the limits of the premises designed therefor, may be such that different minds can come to no other conclusion than that the condition of reasonable safety which the law requires is not affected thereby. Then there is no question for a jury, and the court should direct a verdict for defendant on being requested so to do.

Obviously it is very difficult to say how far removed an excavation must be from a traveled way in order that it may conclusively appear not to be sufficiently close to render the way dangerous, and the facts of each case must, neces-

sarily, largely govern, though there are some definite rules governing the subject, establishing a limit beyond which a jury should not be allowed to extend liability. In *Beck v. Carter*, 68 N. Y. 283, the excavation was ten feet from the established boundary of the thoroughfare. The premises between the boundary and the excavation had been for a long time commonly used by the public, and were essentially a part of it, so that a person traveling outside of such established boundary could not have been considered a trespasser. The court held that under such circumstances it could not be said, as a matter of law, that the excavation was so far removed from the thoroughfare as not to be in dangerous proximity to it. In *Crogan v. Schiele*, 53 Conn. 186, a factory building was located back ten feet from the sidewalk line. There was an area seven feet deep and two feet wide out from the front wall of the building, constructed to admit light to the basement windows. The distance between the outer edge of the area and the sidewalk line was eight feet. The sidewalk was paved with brick, and the space on defendant's grounds between the walk and the area was likewise paved, so that there was nothing to indicate the division line between the public and private ground, except that at each corner of the building there was a fence extending out to the lot line. The court held that whether the areaway was in sufficient proximity to the sidewalk to render it unsafe, was a question of fact for the jury. It will be noted that in both of these cases the space outside the thoroughfare was in such condition as to naturally lead persons to travel over it, substantially up to the point of danger.

In *Hardcastle v. S. Y. R. & R. D. Co.* 4 Hurl. & N. 67,—a leading English authority cited generally on this subject and always with approval,—defendant owned a piece of land adjoining a public footway. He maintained a reservoir on such land, distant from such footway about fifteen feet,

where it turned to the right. The space between the footway and the reservoir was a grass plat. The location was such that a person passing along the footway, if he continued on instead of turning at the proper place, would pass from the footway onto and over the grass plat, and step off a bank into the reservoir. Plaintiff's intestate proceeded in the manner indicated, and was drowned. The question was whether the defendant owed to the public the duty to maintain a barrier so as to guard against persons so leaving the traveled way and proceeding into the place of danger. The court held that defendant was not liable; that the rule that an abutting owner who so maintains a dangerous excavation adjoining a traveled way that a person in the exercise of ordinary care is likely, by a false step or by the sudden starting of a horse, to be thrown into it, is liable to a person so injured did not apply. "When," said POLLOCK, C. B., "the excavation is made some distance from the way, and the person falling into it would be a trespasser upon defendant's land before reaching it, the case is far different. A man getting off a road on a dark night, and losing his way, may wander to any extent; and, if the question be for the jury, no one can tell whether he is liable for the consequences of his act upon his own land or not. We think that the proper and true test of legal liability is whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise,— if in every case it was to be left as a fact to the jury whether the excavation were sufficiently near to the highway to be dangerous. When a person dedicates a way to the public, there does not seem to be any just ground, in reason and in good sense, that he should restrict himself in the use of the land adjoining to any extent further than that he should not make the use of the way dangerous to the persons who are upon it and using it. He gives no license to the persons using the way to trespass upon adjoining lands; and if they, in doing so, came to misfortune,

we think they must bear it, and the owner of the land is not responsible."

In the foregoing we quote liberally from the *Hardcastle Case*, as it states the true rule which has been adopted generally in courts of this country, and has been frequently quoted with approval here, notably in *Klix v. Nieman*, 68 Wis. 271. The same principle was applied in *Binks v. S. Y. R. & R. D. Co.* 113 Eng. C. L. 244. There the side of the canal was twenty-four feet from the footway. The public were permitted to use the intervening space. Plaintiff's intestate accidentally left the footway on a dark night, passed over such space, fell into the canal, and was drowned. The court held that the rule of liability of landowners for dangerous places upon their premises near traveled ways is confined to where such dangerous places adjoin such ways so as to render them unsafe for persons lawfully using them. See, also, as to the general principle, *Wheeler v. Westport*, 30 Wis. 392; *Olson v. Chippewa Falls*, 71 Wis. 558; *Houfe v. Fulton*, 29 Wis. 296; *Slivitzki v. Wien*, 93 Wis. 460; and particularly *Fitzgerald v. Berlin*, 64 Wis. 203, and *Gramlich v. Wurst*, 86 Pa. St. 74, where the rule is stated thus: If the excavation is so far removed that the traveler must become a trespasser before reaching it, the landowner is not liable. Applying that rule, defendant was held liable in *Hadley v. Taylor*, L. R. 1 C. P. 53, where there was a hole on defendant's land within fourteen inches of the public way, and plaintiff, a traveler thereon, accidentally slipped and fell into the hole. Mr. Justice WILDE, citing *Beck v. Carter*, 68 N. Y. 283, said, in effect, that the test of whether a dangerous place is in such close proximity to the traveled way as to render it unsafe is whether a person may be injured from an accident happening on such way, or whether he must wander from the way before he is in danger. To the same effect are *Drew v. Sutton*, 55 Vt. 586, where there was an embankment six inches from the boundary of the traveled way, and

Holmes v. Drew, 151 Mass. 578, where a defective walk was constructed adjoining the public walk, so as to be apparently a part of it. In *Warner v. Holyoke*, 112 Mass. 362, where the dangerous place was fifteen feet from the public way, and was reached by the traveler diverging therefrom on a private way to the place of danger, the lower court instructed the jury, in effect, that there is no duty to maintain barriers except against dangerous places in such close proximity to the traveled way as to endanger the safety of persons traveling thereon; that no duty exists to maintain barriers to prevent travelers from straying from the highway; and when a person leaves the limits thereof, and proceeds twenty feet therefrom to the place of danger, and is injured, he cannot recover.

From the foregoing, to which abundance of authority might be added, it will be seen that where the dangerous place is so far removed from the boundaries of the premises designed for travel that a traveler thereon, in the exercise of ordinary care, is not liable to be injured, if in fact there is a substantial space between the boundaries of the traveled way and the dangerous place, so that to reach such place the traveler must necessarily wander from or pass wholly outside such traveled way, and become a trespasser, in order to reach the danger, then, as a matter of law, such place cannot be held to be substantially adjoining such way so as to render it unsafe, within the meaning of the rule governing the subject, and a verdict to the contrary by a jury cannot change the fact. Such fact being conclusive, it is the law as well, and not open to consideration by a jury.

Applying the foregoing to this case, a conclusion is easily reached. The driveway in question was twelve feet wide, graveled, and its limits well defined. The side nearest the open cellar was over twenty feet therefrom. Between the cellar and the driveway at the west end of the former was a pile of stone extending out to within a foot or two of the

driveway. On the opposite side, extending from the house nearly to the driveway, was also a pile of stone. There was a clear space of grass plat between the driveway and the cellar from twenty to twenty-five feet wide. The plaintiff's horse became unmanageable, and caused the carriage to wholly leave the driveway and pass across the grass plat to the point of danger. It would be as reasonable to hold the defendant liable if the horse had proceeded a hundred feet or more before the accident happened. To sustain the verdict would be to shift the misfortune from the person upon whom it first fell to another, without such other having violated any duty owing to such person. The verdict should have been directed in defendant's favor, as requested. The trial court erred in that regard, and erred later in not setting aside the verdict and granting a new trial on defendant's motion; and later erred in not granting defendant's motion for judgment in his favor notwithstanding the verdict.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

A review of the authorities as to liability for dangerous premises lying beside a highway or frequented path is found in a note to *Lepnick v. Gaddis* (72 Miss. 200), in 26 L. R. A. 686.— REP.

SCHMIDT, Respondent, vs. AMERICAN MUTUAL ACCIDENT ASSOCIATION, Appellant.

May 3 — May 30, 1897.

Accident insurance: Classification of risks: Change of occupation: "Supervising."

1. By the manual for agents of an accident insurance company bakers were divided into two classes, "baker, proprietor, not working" being in class AA, and "baker, working shop or driving wagon,"

in class C. The home officers, however, were not absolutely bound by such classification, but might modify the same to suit the exigencies of particular cases. The company issued to an applicant, who stated that he was a "bakery and confectionery proprietor," "supervising," and worked for himself, a certificate insuring him as a "bakery and confectionery proprietor" under class AA. *Held*, that the company had made an exceptional classification and rated the risk as AA.

2. The acts of the insured in such case in not only indicating how the work should be done but actually taking hold and assisting therein when necessary or convenient would not constitute a substantial change of occupation, since the word "supervising," as used in the application, means taking part in the work.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an action to recover $5,000 upon an accident insurance certificate issued by defendant, on account of the death by accident of Henry F. Schmidt, the husband of the plaintiff. The defenses necessary to be considered on this appeal were to the effect: (1) That the insured at the time of his death was engaged in a different and more hazardous occupation than that which he was supposed to be engaged in when insured, namely, that he was a "baker working," and not a "baker, proprietor, not working;" the rules and classification of the company providing that a baker working belonged to class C, upon whose death an indemnity of $1,500 was to be paid, whereas a baker, proprietor, not working, belonged to class AA, and upon his death an indemnity of $5,000 was to be paid. Wherefore the defendant asked reformation of the certificate so as to accord with the facts. (2) That at the time of the accident by which the deceased was killed said deceased was engaged in the performance of an act pertaining to a more hazardous occupation than that under which he was insured, and that under the terms of the policy there could only be a recovery of the indemnity provided for such more hazardous occupation.

The certificate was issued May 2, 1894, and ran in favor of the plaintiff. The deceased was then a baker and confectioner, operating a small bakery and confectionery shop in Oshkosh, and also operating a saloon in the basement. He lived with his wife in the same building. In February previous to the issuance of the policy, it appears, he discharged his baker, and thereafter he, up to the time of his death, managed his bakery and confectionery himself; the evidence showing that he superintended and gave directions as to the operation of the shop, and did some manual labor himself, while his wife and his servant girl did the greater part of the work. He made written application for the issuance of the certificate in question, and in the application, in answer to appropriate questions, he described his occupation as "confectioner and baker proprietor," his duties as "supervising," and that he was employed by "himself;" and he applied for classification AA, which is the most favored class, the indemnity in case of death being $5,000. Upon this application the defendant issued to him a certificate describing him as "proprietor of confectionery and bakery," and classified him in class AA. The indemnity for accidental death in this class, as above stated, is $5,000. The certificate contained this provision among others: "If injury occurs while performing an act pertaining to an occupation classed by the association as more hazardous than the one under which this certificate is issued, or while engaged in a more hazardous occupation, such member or beneficiary shall be entitled to such amount of indemnity as the premiums paid would purchase in the class in which such occupation is classified."

For a short time previous to the issuance of this certificate the deceased had acted as agent of the defendant association, soliciting insurance, and had in his possession a copy of the defendant's agents' manual, containing the classification of risks adopted by the defendant. In this manual

are the following classifications: "Baker, proprietor, not working or driving wagon, AA. Indemnity for death, $5,000." "Baker, working shop or driving wagon," also "confectioner working, class C. Indemnity in case of death, $1,500."

The deceased died from some sort of accident on the 19th of September, 1894. The facts in relation to his death are substantially undisputed and were stated by the circuit judge as follows: "He arose in the morning, ate his breakfast, went into his store, and looked over some bills for a few moments. After that he went out by the side door into his back yard for some purpose, and was seen a few moments after by one witness returning and staggering, or walking in an uncertain manner. He stopped, and supported himself for a moment on some object there, and then proceeded until he reached the vicinity of the door, when he fell near or upon a large cake of ice, two of which had been recently left there by the ice man. In so doing he received certain injuries which were the apparent cause of his death. This back yard adjoined a storehouse and chicken coop and several fruit stands and a pile of wood. It was also adjacent to a summer garden, in which he was accustomed to serve refreshments to his customers. No ice cream was made nor baking done that morning."

A special verdict was rendered, in which the jury found, in answer to appropriate questions: (1) That the deceased received his injuries through external violence and accidental means; (2) that such injuries were the sole cause of his death; (3) that none of the injuries were intentionally inflicted by another person; (4) that the manager of the defendant knew that the deceased kept a saloon before the last premium was paid. Upon this verdict judgment for the plaintiff for $5,000, interest, and costs was rendered, and the defendant appealed.

For the appellant there was a brief by *Phillips & Hicks*, and oral argument by *M. C. Phillips*.

For the respondent there was a brief by *Barbers & Beglinger*, and oral argument by *Charles Barber* and *Fred Beglinger*. To the point that supervising implied the doing of work, they cited *Neafie v. Manufacturers' Acc. Ind. Co.* 55 Hun, 111; *Brink v. Guaranty Mut. Acc. Asso.* 7 N. Y. Supp. 847; *Wilson v. N. W. Mut. Acc. Asso.* 53 Minn. 470; *National Acc. Soc. v. Taylor*, 42 Ill. App. 97; *Hall v. Am. Masonic Acc. Asso.* 86 Wis. 518.

WINSLOW, J. Defendant's counsel frankly state that they make no contention here as to the accidental nature of the injuries received by the deceased, and that such injuries were the sole cause of his death. They claim, however, that two questions should have been submitted to the jury, namely: (1) Whether or not the occupation of the deceased was that of a "baker working" at the time of his death; (2) whether his injuries occurred while he was engaged in a more hazardous occupation than that under which he was classified in his certificate.

Taking these questions in the inverse order, it is sufficient to say, as to the second contention, that there is absolutely no evidence in the case from which the jury could have found that the deceased was engaged in any act pertaining to the occupation of a working baker or confectioner when he received the fatal injuries. In what manner he received the injuries seems quite a matter of mystery, but certain it is that there was no evidence which would have justified the jury in saying that he was actually working as a baker or confectioner at the time.

Nor do we think there was error in declining to submit the first question above referred to. It is true that the manual of the defendant association classifies bakers in two classes,

to wit: "Baker, proprietor, *not working*" in class AA, for which class the death indemnity is fixed at $5,000; and "baker, working shop or driving wagon," in class C, for which class the death indemnity is fixed at $1,500. It affirmatively appears, however, from the defendant's manual, that these classifications are not inflexible, but may be varied by the home office as circumstances indicate that the applicant is entitled to a more favorable rating than that usually given to the particular occupation. Just such a modification seems to have been made in the present case. The deceased stated in his application that he was a "bakery and confectionery proprietor, supervising," and that he was working for himself. The defendant insured him, as a "bakery and confectionery proprietor," under class AA. It did not classify him as a "baker, proprietor, not working," as its manual specifies, but apparently made an exceptional classification, and rated the risk as "AA." Now, the defendant knew that the deceased was supervising his business. Supervising does not mean "not working." On the contrary it means, and would be naturally understood to mean, taking part in the work. Supervising indicates work, not idleness. It would be entirely consistent with supervising if the deceased not only indicated how work was to be done but actually took hold and assisted in the work when necessary or convenient. This seems to be just what the deceased was doing at the time the policy was issued, and what he continued to do. In our judgment the defendant made its classification with sufficient knowledge of the facts, and there has been no substantial change of such occupation.

No further questions are raised which require treatment. Some exceptions to the admission of evidence are referred to in the brief, but they are of no moment, especially in view of the fact that the bill of exceptions does not contain all of the evidence as to the cause of the accident.

By the Court.—Judgment affirmed.

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LENZ, Respondent, vs. WHITCOMB and another, Receivers, Appellants.

May 3—May 21, 1897.

Railroads: Injury at highway crossing: Failure to look: Contributory negligence: Court and jury.

In an action to recover for personal injuries occasioned by collision with a locomotive at a highway crossing, it appeared that plaintiff and a companion, driving a gentle horse used to cars, approached the track at an angle of thirty degrees; that they stopped twice to look and listen, the last time when they were about 200 feet distant, and then drove on at a moderate pace without again looking; that by turning partly around, at any point within 500 feet of the crossing, they had an unobstructed view of the track in the direction from which the train came for a distance of nine-tenths of a mile; and that plaintiff was familiar with the locality and knew that trains were liable to pass at any time. *Held*, that he was guilty of contributory negligence, as matter of law, in failing to look and listen again before crossing.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

This action was brought against the defendants, as receivers of the Wisconsin Central Railroad Company, to recover for injuries to person and property, resulting from a collision with one of defendants' freight trains, at a road crossing a short distance outside of the corporate limits of the city of Oshkosh, about 6 o'clock in the afternoon of July 17, 1895. The negligence alleged was excessive speed and failure to give the statutory signals, which the plaintiff's evidence tended to establish. At the close of the plaintiff's case the defendants moved for a nonsuit, which was denied, and, at the close of the testimony, the defendants moved the court to direct a verdict in their favor. This was also denied. The jury found that the plaintiff was injured, in person and property, by reason of the defendants' negligence, and that the plaintiff was not guilty of negligence which contributed

proximately to the injury. Plaintiff's damages were assessed at $200. Defendants moved to set aside the verdict and for a new trial, on the ground that the verdict was contrary to the law and the evidence, and for error in refusing to direct a verdict for the defendants. This motion was denied, and the plaintiff had judgment for $200 damages and costs, from which the defendants appealed.

The question presented was whether the court erred in refusing to direct a verdict for the defendants, and in denying the motion for a new trial, for the reason that the plaintiff was guilty of contributory negligence. The highway upon which the plaintiff was traveling, with a horse attached to a covered peddling wagon, was called Oregon street, and crosses the railroad track at an angle of about thirty degrees. The south right of way fence, which is thirty-two feet from the track, if projected, would intersect the highway about eighty-five feet from the crossing. A point on the highway 500 feet south of the crossing is 209 feet westerly at right angles from the track. At the time of the accident, the field occupying the angle between the track and the highway was planted to corn, and there were nine shade trees along the highway. The track approaching the highway was upon a grade or embankment at the crossing some two feet above the level of the road, and, at a culvert about 2,500 feet easterly, some twelve feet above the general field. The highway south of the railroad was substantially level for a long distance. A person standing at any point in the highway, within 500 feet of the crossing, could see a train on the track at any point within nine-tenths of a mile. The plaintiff testified he could, from such 500-foot point, see the track, the cattle run or culvert, and beyond it the next highway crossing, over 2,000 feet. At a 300-foot point about the same view was to be had. Except for the shade trees and the corn, there was no obstruction to vision at any point on the highway; and a man

five feet six inches in height, standing in the highway at the 500-foot point, could see the railroad track over the top of the corn in the field, if six or six and one-half feet tall. The photographs introduced by the defendants, taken within two days after the accident, show that there was no obstacle to an unobstructed view of the train upon the track, taken from any point on Oregon street, within 262 feet of the railroad crossing, and that the shade trees did not interfere. The fireman could see from the whistling post, 1,320 feet, the horse and wagon approaching the crossing across the corn field, and saw them until the collision.

On the day in question, plaintiff and a man named Chase were returning home from a trip in the country, riding in the direction of Oshkosh, on a covered wagon. The cover of the wagon did not extend forward of the seat, and the wagon did not rattle. At Chase's suggestion, they stopped 500 feet south of the track, looked and listened, proceeded then 200 or 300 feet, and, as a precaution, stopped again, and looked and listened. Chase looked to the north, and the plaintiff to the south, saw nothing, and proceeded at a trot to within twenty or thirty feet of the crossing, when plaintiff first heard or saw the train, and the collision followed. After stopping the last time, some 200 or 300 feet from the track, the horse trotted right along till the accident, and neither party looked or listened for the train during the interval. The horse had been raised in a pasture near the railroad, was quiet, would stop when the driver bade him, and there was no trouble driving it with the voice. The evidence was that trains were liable to be running at any time. The day was fine, and not windy, and the wagon was free from rattle. After stopping and listening at the 200-foot point, plaintiff kept all the time his eyes on the horse, and the horse trotted along. As he approached the crossing, the train caught him there, and threw him into the ditch. He said: "I see the train, which was right near

up to me. If I jump out, I would jump right on it. At that moment it catched the horse already, and that is all that I know." He was familiar with this railroad crossing,—had been in the habit of driving there twice a week for twelve years. He testified that he listened, but did not hear anything. Chase sat by his side, and they were talking to each other. After he left the 200-foot point, he did not look again. Chase testified that after they stopped the second time the horse trotted all the time until the collision; that the first he heard of the train was just as they struck the grade to cross the railroad track; he heard a rumbling noise, and saw the engine; that, after the 200-foot stop, there was no other stop for looking, or any other examination for a train from the east. The photographs taken within two days after the accident, and a map made to a scale and measurements, upon which surrounding objects and those between the highway and the track were located, were put in evidence.

For the appellants there was a brief by *Howard Morris* and *Thos. H. Gill*, and oral argument by *Mr. Gill.*

F. W. Houghton, for the respondent.

PINNEY, J. For a distance of from 200 to 300 feet, as the plaintiff and his companion approached the track at an angle of thirty degrees, neither of them looked to see whether any train was approaching the crossing, and it is clear that there was no obstacle that in any material respect could have obstructed or obscured their view. The plaintiff was entirely familiar with the locality, crossed there twice, at least, every week, and knew that a train was liable to pass at almost any time. The horse was a gentle one, and accustomed to the presence of trains. By looking northerly, they could see in the direction of the city whither they were going. By turning partly around to the right, the view was unobstructed, so that a person at any point within the highway, within

500 feet of the crossing, could see a train on the track, in the direction from which it approached, for a distance of nine-tenths of a mile. They understood that a train was likely to come along, and they had stopped twice, and looked in both directions, and listened. When they started up the last time, within about 200 or 300 feet of the crossing, one of them testified that they proceeded at a moderate trot until struck by the train, and the other that the horse walked about 100 feet, and then proceeded at a moderate trot. Both say that they listened, and both agreed that they did not look for an approaching train. The rule is inflexible that a party approaching the track, intending to cross it, is bound to both look and listen, and a failure to do so is negligence, which disentitles him to recover if injured, in crossing, by the train. The failure of the defendants to give the proper signal was such negligence as would have made them liable in the action, in the absence of contributory negligence on the part of the plaintiff, but, if he was guilty of such negligence, the negligence of the defendants becomes immaterial. If the plaintiff could have prevented or avoided the accident by using his eyes in looking and his ears in hearing, then he was not entitled to recover. It is beyond question that had he used ordinary vigilance in looking, after passing the 200-foot point, he would have avoided injury. With his horse under control, he took the risk of proceeding without attempting to make further observation. *Bower v. C., M. & St. P. R. Co.* 61 Wis. 457; *Williams v. C., M. & St. P. R. Co.* 64 Wis. 1; *Seefeld v. C., M. & St. P. R. Co.* 70 Wis. 216; *Schmolze v. C., M. & St. P. R. Co.* 83 Wis. 659; *McKinney v. C. & N. W. R. Co.* 87 Wis. 282; *Nelson v. D., S. S. & A. R. Co.* 88 Wis. 392; *Groesbeck v. C., M. & St. P. R. Co.* 93 Wis. 505.

It was urged that the question of contributory negligence in this case was one of inference, and that, where the inferences to be drawn from the evidence are doubtful and uncertain, the question is one for the jury within the rule in

Seefeld v. C., M. & St. P. R. Co., supra; but upon the facts about which there is no dispute, and against which there can be no fair inference, it is clear that the plaintiff was guilty of contributory negligence. The angle of approach of the highway and the railroad track was only about thirty degrees, and for a considerable distance they were quite near to each other, and at no point, for 500 feet, more than 200 feet apart. Knowing that a train was liable at almost any time to pass over the crossing, and that the passenger train was nearly due, if the view of the track was so obstructed that he could not see an approaching train in time to stop his horse before colliding with it, and if he was unable to hear an approaching train when the wagon was in motion, he should have stopped his wagon before arriving at the danger line, and taken proper observations and precautions to have avoided injury. Had he continued to exercise proper caution after he started up the last time, there is no reason to suppose but that he would have been able to have avoided injury; but he wholly omitted to do so. Although he had observed all reasonable caution until he was within 200 feet of the point of danger, there can be no fair inference of ordinary care, as against the plain and established facts of the case, which show that the plaintiff, by contributory negligence, is precluded from recovering. The circuit court should have set aside the verdict, and granted a new trial.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

McCallan, Appellant, vs. Buckstaff, Respondent.

May 3 — May 21, 1897.

Mechanics' liens: Evidence: Experts: Appeal.

In an action to enforce a mechanic's lien, where the amount of materials furnished and the number of days work performed was at issue, the testimony of experts who had examined the premises that so much material as claimed could not have been used for the purpose, according to the plans and specifications for the building, and that the work could fairly have been done in much less time than claimed, was admissible, and a judgment based thereon will not be reversed as against the clear preponderance of the evidence.

Appeal from a judgment of the circuit court for Winnebago county: Geo. W. Burnell, Circuit Judge. *Affirmed.*

This was an action to foreclose a mechanic's lien. The amount of materials furnished, and the number of days work performed, were the only facts in issue. The cause was tried by a referee, who found that the labor and materials furnished were less in amount than the sum which had, before the commencement of the action, been paid to the plaintiff therefor. The report of the referee was confirmed by the court, and a judgment was rendered against the plaintiff, dismissing the complaint with costs. From this judgment, the plaintiff appeals.

James Freeman, for the appellant.

For the respondent there was a brief by *Barbers & Beglinger*, and oral argument by *Fred Beglinger.*

Newman, J. Errors in the admission of testimony where the trial is before the court or a referee are unimportant, where the judgment is right on the competent evidence. In causes tried by the court or a referee, the judgment will not be reversed on questions of fact, unless it is clearly against

the weight of the evidence. *Momsen v. Plankinton, ante,* p. 166.

The plaintiff did a job of gas fitting on a contract by which he was to be paid for the materials used what they should cost him, and for the work an agreed wage per diem. The questions controverted were the amount of materials furnished and the number of days work done. The plaintiff's witnesses testified positively to the amount of material furnished and number of days work done. The defendant produced the testimony of experts in the business, and who had examined the premises, to the effect that so much material as claimed by the plaintiff could not have been used for the purpose, according to the plans and specifications for the building, and that the work could have fairly been done in much less time than claimed by the plaintiff. It was a simple question of fact. The class of testimony produced by the defendant was competent on the issue. The judgment cannot fairly be said to be against the weight of the evidence.

By the Court.—The judgment of the circuit court is affirmed.

McELROY and another, Appellants, vs. MINNESOTA PERCHERON HORSE COMPANY, Respondent.

May 4—May 21, 1897.

Corporations: Ultra vires: *Defense, when not available: Authority of president to make contract: Estoppel.*

1. Where one of the purposes of a corporation, as specified in its articles of organization, was to deal in real estate in town and country, a contract to pay real-estate agents for effecting an exchange of the corporate property (Minnesota land) for Chicago real estate was not *ultra vires.*
2. A corporation cannot invoke the doctrine of *ultra vires* to prevent a recovery on a contract which has been fully performed by the other party thereto.

3. In an action against a corporation upon a contract to pay agents for effecting an exchange of real estate, executed in the name of the corporation by its president, want of authority on the part of the latter to make the contract was set up as a defense. It appeared that practically all the stock was owned by the president, a few shares being nominally held by relatives and employees, who made up the board of directors, for the purpose of keeping up the corporate organization: that for five years the affairs of the corporation had been conducted by the then president or his predecessor without any objections or proceedings whatever by the stockholders or directors, so far as appeared from the records; that during such time no meeting of either body had been held except one for filling vacancies in the board of directors; and that for over two years negotiations had been pending with the plaintiffs concerning the subject matter of the contract, which had been conducted by the president as substantially the only person interested. *Held*, that the corporation was estopped to deny the president's authority.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Defendant corporation was organized under the laws of the state of Minnesota, among other things, for the purpose of buying, selling, and dealing in real estate. Its principal place of business, by the articles of organization, was located in the town of Troy, Pipestone county, Minnesota. The business was actually transacted, mostly, at the residence of the president in Milwaukee or Oshkosh, Wisconsin. The principal property of the corporation on the 23d day of November, 1893, was a farm, and some live stock and other personal property thereon, in Pipestone county, Minnesota. On the date mentioned, George M. Paine, the president of the company, visited plaintiffs, who were real-estate agents in the city of Chicago, and entered into a written agreement with such agents to the effect that the corporation would pay such agents $3,750 to effect a trade whereby the Pipestone farm property could be exchanged for some Chicago real estate, particularly described in the contract, and upon

terms therein specified. Plaintiffs thereafter obtained a binding agreement on the part of the owners of the Chicago property to make such exchange, and notified the defendant thereof. It refused to carry out the contract or to pay plaintiffs, and thereupon they sued for their commission. The complaint set forth a good cause of action for such commission. Defendants answered, among other things, that George M. Paine, the president of the corporation, had no authority to make the contract with plaintiffs, and that such contract was not binding upon the defendant. The evidence established plaintiffs' right to recover unless defeated under that part of the answer particularly referred to.

The evidence showed that George M. Paine owned 994 shares of the stock of the corporation, or all of the stock except six shares, which were owned by other persons principally for the purpose of having a sufficient number of officers to fill the offices and keep up the corporate organization; that Paine was substantially the only person pecuniarily interested; that he had principally transacted its business for a long time and without objection on the part of the persons holding the six shares; that in the making of contracts it had not been customary to authorize them by action of the board of directors, but for Paine to conduct the business without previous special authority; that the farming business had been conducted at a loss for some time, and that it was desired to dispose of that property; that to that end the contract of employment made with plaintiffs was entered into by Paine on behalf of the corporation, but that there was no action on the part of the board of directors or stockholders of the company authorizing such contract. Such contract contemplated an exchange of practically all of the corporation property for the Chicago real estate. Negotiations with the agents had been carried on from time to time for upwards of a year in regard to exchanging the Minnesota farm property for other property.

At the close of the evidence the defendant moved the court for a nonsuit, which was granted, and plaintiffs' counsel excepted. Judgment was entered in favor of the defendant, from which this appeal is taken.

For the appellants there was a brief by *Barbers & Beglinger*, and oral argument by *Chas. Barber*. They argued, among other things, that where a contract has been fully executed the doctrine of *ultra vires* is not available. *Hawkes v. Eastern Counties R. Co.* 1 De Gex, M. & G. 760; *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331; *Norwich v. Norfolk R. Co.* 4 El. & Bl. 445, 82 Eng. C. L. 397; *Steam Nav. Co. v. Weed*, 17 Barb. 378; *Poock v. La Fayette Building Asso.* 71 Ind. 357; *Pancoast v. Travelers Ins. Co.* 79 id. 172; *Wright v. Pipe Line Co.* 101 Pa. St. 204; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Manchester & L. Railroad v. Concord Railroad*, 66 N. H. 100; *Railway Co. v. McCarthy*, 96 U. S. 258; *Rider Life Raft Co. v. Roach*, 97 N. Y. 378; Morawetz, Priv. Corp. § 581; *Holmes & G. Mfg. Co. v. Holmes & W. Metal Co.* 127 N. Y. 252; *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488; *Heims Brewing Co. v. Flannery*, 137 Ill. 309; *Thompson v. Lambert*, 44 Iowa, 239; 27 Am. & Eng. Ency. of Law, 360.

For the respondent there was a brief by *Felker, Stewart & Felker*, and oral argument by *F. C. Stewart*.

MARSHALL, J. The first question that requires consideration is, Was the contract of employment, made with plaintiffs, to negotiate an exchange of the corporate property in Pipestone county, Minnesota, for Chicago real estate, *ultra vires?* That must be answered in the negative. The articles of organization expressly provide, among the purposes of the corporation, that of dealing in real estate in town and country. Such purpose is made very prominent in the articles, and seems to have been one of the principal purposes of the organization. But if such were not the case, the con-

tract of agency having been fully executed on the part of plaintiffs, the doctrine of *ultra vires* cannot be invoked by the corporation to avoid performance of its part. *John V. Farwell Co. v. Wolf*, *ante*, p. 10. This subject has been recently, in the case cited, so exhaustively discussed, and the principles governing it laid down by this court, that further discussion of the matter at this time appears to be unnecessary.

If the trial court did not nonsuit plaintiffs upon the theory that the doctrine of *ultra vires* applied, then we assume the learned circuit judge held that the president of the corporation was incapable of binding it because no special authority was given him so to do by the board of directors. If it were the law that the president of a trading corporation could not bind it without special authority in that regard, intolerable mischiefs would result, for no person could then safely act in business matters with such an organization without first investigating the corporate records in respect to the authority delegated to its agent. When the law is rightly understood and administered, it does not sanction any such difficulties in business operations. A corporation may so conduct its affairs as to confer by implication, upon its president, powers much beyond those strictly incident to his office, even to the extent of exercising the entire powers of the corporation, which, by the articles, are vested solely in the board of directors. The powers of the president of a corporation, or any other officer thereof, do not depend solely upon the title of the office or the actual delegation of power, but upon the appearances with which the officer is clothed by the corporation; that is to say, it is the apparent power of the officer, not the actually delegated power, which governs. The law is well settled that, within the scope of his apparent power, the president of a corporation, by his acts, binds such corporation the same as if he were the agent of a natural person. This doctrine has been

extended, from necessity, to give adequate protection to innocent persons dealing with corporate organizations through their officers and agents. As said by Prof. Thompson, in his late work on Corporations: "Few of the supposed dangers attending such dealings in fact exist." In §§ 4623, 4624 he lays down four well-established rules or principles that a person dealing with the president of a corporation may invoke for his protection when the corporation attempts to repudiate the acts of such president: (1) That the corporation is estopped from claiming in the particular instance that its president had not the powers which it has customarily allowed him to exercise in the face of the public. (2) That, if the corporation has received the benefit or fruits of the transaction, it is estopped from repudiating it, and is assumed to have ratified it. (3) In case the contract is evidenced by a sealed instrument, the principle that the presence of the corporate seal carries with it a presumption of actual authority on the part of the president and secretary to execute the contract. Such presumption, however, is rebuttable. (4) That proof of the authority of the president may be inferred from circumstances; it need not necessarily be established by the record. The first, second, and fourth of the above-mentioned principles were applied by this court in *Ford v. Hill*, 92 Wis. 188, where a corporation was held estopped from repudiating the act of its president in executing a judgment note, upon the ground, among others, that it was within the scope of his apparent authority as exercised for a considerable length of time.

Such principles here apply to the undisputed facts. George M. Paine was substantially the corporation. He owned all the stock, except six shares obviously kept in the names of others to render them eligible to hold offices. No one but Paine appears to have had any substantial pecuniary interest in the organization. The board of directors was made up of himself, his son Nathan Paine, who lived with him,

his son-in-law Charles Nevitt, a resident of the same place, T. M. Brown, an employee on the Minnesota farm, and H. M. Bogart, a relative living in Minneapolis. The corporation affairs, for about five years, had been conducted by George M. Paine and by his predecessor in office without any objections or proceedings whatever by stockholders or directors, so far as appears from the records. No election of directors by stockholders was had during that time, and no meeting whatever held, except one a few months before the making of the contract, at which the only business transacted was to fill the places of several directors who had resigned, which was done by election by those who remained. For two years and more negotiations had been going on for a sale of the property through plaintiffs' Chicago agency, all conducted by Paine or his predecessor, as substantially the only persons interested. The whole course of the corporation had been such as to lead the public, and particularly plaintiffs, to regard the president of the corporation as having full power to act in its behalf as its general agent, and to do all that such an agent might properly be authorized to do. Such was the apparent scope of the powers of George M. Paine at the time of the making of the contract in question. To such a state of facts the doctrine of estoppel, upon which all the aforesaid rules are founded, applies to protect the plaintiffs from the injustice of allowing the corporation to repudiate the act of its president, with whom they dealt upon the faith of appearances for which the corporation was responsible.

It follows from the foregoing that the nonsuit was improperly granted, and that the judgment of the circuit court should be reversed for that reason, and a new trial granted.

By the Court.— So ordered.

96 324
112 202

ROTTSOLL, Respondent, vs. TWO RIVERS MANUFACTURING COMPANY, Appellant.

May 4 — May 21, 1897.

Appeal: Order granting new trial.

Under ch. 212, Laws of 1895 (a revision of sec. 3069, R. S., relating to appeals, from which the provision authorizing an appeal from an order when it grants or refuses a new trial was omitted), an order denying a motion for judgment on the verdict and granting a new trial on the ground of errors in the instructions to the jury is not appealable; and the fact that the appeal was taken from that part of the order only denying the motion for judgment is immaterial.

APPEAL from an order of the circuit court for Manitowoc county: N. S. GILSON, Circuit Judge. *Appeal dismissed.*

The facts are stated in the opinion.

For the appellant the cause was submitted on the brief of *Nash & Nash.*

For the respondent there was a brief by *Schmitz & Kirwan*, and oral argument by *A. J. Schmitz.*

CASSODAY, C. J. This action was brought to recover damages for an injury to the plaintiff's hand alleged to have been caused by the defendant's unreasonable delay in making repairs to a carriage operated by plaintiff in the defendant's sawmill, after being notified of the defects, and after promise to repair the same. Issue being joined and a trial had, at the close thereof the jury returned a special verdict, consisting of twenty-nine different questions, generally in favor of the plaintiff, and assessing his damages at $997.

In considering the questions here presented, it is only necessary to refer to the twenty-eighth question (next to the last one), which, with the answer, is as follows: "Was the plaintiff guilty of any want of ordinary care which contributed to produce or cause his injury?" Answer: "Yes."

This answer was given under a charge of the court to the effect that if the plaintiff was guilty of any want of ordinary care, however slight, which contributed to produce or cause the injury complained of, then they should answer the next to the last question "No;" but, if he used ordinary care,— such care as persons of ordinary care would use under similar circumstances,— then they should answer that question "Yes." Upon the return of the special verdict, the court further stated to the jury that "the court, in charging you, gentlemen, perhaps was not quite as explicit as it ought to have been. It stated to you that if the plaintiff was guilty of any want of ordinary care, however slight, which contributed to produce or cause the injury complained of, you should answer the next to the last question 'No;' but you were also instructed that, if he exercised ordinary care in performing his duty, you were to answer the same question 'No.' Of course, by the first part of this charge the court meant, and I presume you understood, that you were to answer it 'Yes.' Is that the way you understood the charge, gentlemen?" The foreman: "I think that was the understanding." Thereupon, and at the same term of the court, the defendant moved the court for an order for judgment upon the verdict in its favor; and the plaintiff then moved the court to set aside the special verdict and grant a new trial. Upon the hearing of said motions, the court, in effect, ordered that the motion made by the defendant be denied, and the motion of the plaintiff to wholly set aside the special verdict and grant a new trial be granted; and the special verdict was thereby vacated and set aside, and a new trial awarded, without costs; and the order further states that "this order is made on account of error or want of clearness in that part of the charge first quoted above, and for no other reason." The defendant appeals to this court from that part of said order which denies the defendant's motion for judgment in its favor upon the special

verdict, and which states the reason for setting aside the verdict and granting a new trial, but from no other part of the order.

The granting of a new trial ordinarily rests in the sound discretion of the trial court, and its action will not be disturbed unless it is manifest that there was an abuse of such discretion. *Evans v. Rugee*, 63 Wis. 31; *Farley v. C., M. & St. P. R. Co.* 89 Wis. 208, and cases there cited. If this case were before us on the merits, we could not say that there was any abuse of such discretion. When a new trial is granted for the misdirection of the court, it may be done without costs. *Kayser v. Hartnett*, 67 Wis. 256, and cases there cited. This court has held that "an order denying a motion for judgment on the minutes and special verdict, not followed by judgment for the opposite party, affects a substantial right, and is appealable." *Murphey v. Weil*, 86 Wis. 643. But this decision was prior to the enactment of ch. 212, Laws of 1895, which amended sec. 3069, R. S., among other things, by dropping out of the third subdivision the clause "when it grants or refuses a new trial." The manifest purpose was to cut off all appeals from orders granting or refusing a new trial. Here the order granted a new trial. True, the appeal is not from that part of the order, but is only from the part of the order denying the defendant's motion for judgment upon the verdict. The effect, however, is in substance the same as an appeal from the whole order; for, should we reverse the part of the order appealed from and allow the balance of the order to stand, then the decision would be ineffectual for any purpose, but, should we reverse the part of the order appealed from, and remand the cause with direction to grant the defendant's motion for judgment, then it would, in effect, supersede and nullify that part of the order granting the new trial, and not appealed from. This view of the act in question naturally follows from the construction which this court has already given

to it. *Davison v. Brown*, 93 Wis. 85; *Gianella v. Bigelow*, 92 Wis. 267. The order does not, "in effect, determine the action, and prevent a judgment from which an appeal might be taken," within the meaning of the act.

By the Court.—The appeal is dismissed.

THE J. B. ALFREE MANUFACTURING COMPANY, Respondent, vs. HENRY, imp., Appellant.

96 327
115 *270
59 LRA 741

May 4 — May 21, 1897.

Mechanics' liens: Amending claim: Landlord and tenant: Priority of liens: Privity of contract: Waiver.

1. A claim for a mechanic's lien which referred only to the leasehold interest in the premises of the person for whom materials had been furnished cannot be amended after the expiration of the statutory time for filing liens so as to assert in addition a claim upon the distinct and separate estate of the owner of the fee.
2. A lease of land for a term of fifty years, which did not contemplate the construction of improvements on the premises but provided only for the payment of a specified yearly rental and the taxes, created the relation of landlord and tenant between the parties, within the meaning of ch. 466, Laws of 1887 (sec. 3314*a*, S. & B. Ann. Stats.), providing that the statutes relating to mechanics' liens shall not be construed as giving a lien where the relation of landlord and tenant exists; and the effect of the statute would not be overcome by the consent of the landlord to the making of improvements.
3. Where money is loaned and a mortgage executed after the commencement of the construction of a mill and the making of a contract for machinery to be placed therein, the lien of the mortgagor on the debtor's interest in the premises is subsequent to the lien for machinery. *Vilas v. McDonough Mfg. Co.* 91 Wis. 607, followed.
4. Where a manufacturer of machinery has equipped a mill for a tenant under a contract, no privity of contract exists between him and the landlord, who also holds a mortgage on the leasehold interest, such as will enable the landlord to insist that there can be no recovery on the contract for want of performance.

5. The tenant in such a case, in the absence of fraud or unlawful combination, would not be precluded from waiving strict performance of the contract and adjusting the manufacturer's claim on fair and equitable terms.

APPEAL from a judgment of the circuit court for Sheboygan county: N. S. GILSON, Circuit Judge. *Affirmed in part; reversed in part.*

This was an action to foreclose a lien of the plaintiff company, as mill builder and mill furnisher, against the defendants J. H. Reysen, Sr., and J. H. Reysen, Jr., copartners under the firm name of J. H. Reysen & Son, and *A. E. Henry*, the appellant, who was the owner in fee of the real estate affected, which consisted of a mill site on two lots in block 26, in Sheboygan Falls, Wisconsin, with the mill privileges and water power appurtenant thereto.

On the 4th of February, 1890, the defendant *Henry* leased the premises to his co-defendant J. H. Reysen, Sr., for the term of fifty years, for the annual rental of $150 per annum for the first three years, and $300 per annum for the rest of the term, and the payment of the taxes. There were no buildings or improvements on the premises at this date. J. H. Reysen, Sr., was then a member of the firm of J. H. Reysen & Son. May 9, 1891, the said firm entered into a contract with the plaintiff to manufacture and set up in the mill building then being erected on said real estate a complete flouring-mill outfit of the capacity of 100 barrels per day for the sum of $6,600, payable in instalments, and to be in operation September 1, 1891. On the 28th of May, 1891, the Reysens, needing money for the erection of mill buildings, and for the equipment thereof, entered into a contract with the defendant *Henry*, by which he agreed to furnish them the sum of $8,000, $2,000 to be advanced on that day, and of the balance $2,000 was to be furnished when the plaintiff delivered the mill machinery at Sheboygan Falls, and $2,000 from time to time when the said mill machinery was being placed

in the mill, and the balance when said Reysens should be called upon to settle with plaintiff. For the purpose of securing said sum of $8,000, the defendant J. H. Reysen, Sr., gave a mortgage to the defendant *Henry* on his leasehold interest in said premises, and thereafter, on the 21st of September, 1891, the defendant J. H. Reysen, Sr., executed a second mortgage upon the said premises for the sum of $2,000, but no part of the consideration for this mortgage was paid to said mortgagor by *Henry*. The defendants Reysen did not pay the agreed purchase price of the machinery, but were in arrears in a sum which, at the time of the judgment herein, amounted to $2,198.54. The machinery furnished by the plaintiff did not comply with the contract, in that it had a capacity only of from sixty to seventy barrels per day, but on the 3d of November, 1891, after it was in place, the defendants Reysen, knowing the fact, without the knowledge or consent of the defendant *Henry*, by a written acceptance of the machinery, waived this failure of performance on the part of the plaintiff, and the only contract or transaction within the knowledge or consent of said *Henry* was the contract for machinery with a capacity of 100 barrels per day. The plaintiff filed its claim for a lien on the 30th of March, 1892, which went upon the express contract, and alleged full performance, and was filed against and claimed a lien upon the leasehold interest of the Reysens only, and claimed a balance due of $2,600. The defendant *Henry* was not mentioned in the claim for a lien, nor was his interest in the land in any way referred to therein, but it alleged that he had, or claimed to have, some lien upon the premises and upon the machinery, which, if any, was subsequent to the lien and claim of the plaintiff. The complaint charged that the said *Henry* was the owner in fee, and that the machinery, etc., was furnished, and the work done, with his knowledge and consent. Judgment was asked in the alternative, either for a lien on the fee and leasehold interest or on the machinery, with the privilege of removing the same.

The case was referred to a referee to hear, try, and determine, who reported sustaining the plaintiff's claim for a lien, and that it was entitled to judgment in the amount of $2,140.04, besides interest, for said machinery, less certain amounts allowed to the Reysens upon their counterclaims in the action, and that the plaintiff was entitled to a foreclosure of all the right, title, and interest of the defendant *Henry* in and to the real estate, flouring mill, mill dam, and mill privileges; that his mortgage for $8,000 thereon should be made subordinate to the claim of the plaintiff, and that the mortgage for $2,000 should be canceled.

The circuit court, upon the hearing of the report, against the objections of the defendant *Henry*, gave the plaintiff leave to amend its claim for a lien by inserting therein, after a description of the premises, "that *A. E. Henry* was, and still is, the owner of the land upon which the said machinery is erected as aforesaid; that said machinery was furnished and said work was done with his knowledge and consent;" and by extending the prayer of the claim for a lien so as to include the fee, title, and interest of the defendant *Henry*. Upon such hearing the court found specially that the lease of February 4, 1890, from the defendant *Henry* to J. H. Reysen, Sr., did not create the relation of landlord and tenant, so as to deprive the plaintiff of its lien against the interest of said defendant *A. E. Henry*, and further amended the report by finding that the plaintiff was entitled to judgment of foreclosure, foreclosing all the leasehold title and interest in and to the said lands, flouring mill, mill dam, and mill privileges of the Reysens, and foreclosing the title and claim of the defendant *Henry* in and to the same, and making said plaintiff's lien prior and paramount to both the mortgages so executed to him as aforesaid, and judgment was entered accordingly.

The defendant *Henry* appealed from so much of the judgment as determined the plaintiff's claim to be a lien upon the interest of said *Henry* in the premises described in the

judgment, either as owner in fee or mortgagee, and so much of said judgment as made the said lien paramount to either of the mortgages held by said *Henry*, and from so much thereof as directed the sale of any right, title, or interest of said *Henry* in or to said premises, and to so much of said judgment as gave any relief or recovery against said *Henry*, or his right, title, or interest in or to the premises.

For the appellant there was a brief by *Quarles, Spence & Quarles*, and oral argument by *George Lines*. They argued, *inter alia*, that neither the owner of the land nor other third party could be affected by a change in the terms of the building contract or a waiver of its performance or any other step necessary to perfect the lien. *Soule v. Dawes*, 7 Cal. 575; *Burnside v. O'Hara*, 35 Ill. App. 150; *White v. Washington School Dist.* 42 Conn. 541; *McKim v. Mason*, 3 Md. Ch. 186; *Stewart v. Christy*, 15 La. Ann. 325; Boisot, Mechanics' Liens, § 5.

Francis Williams, for the respondent, to the point that the claim for lien was properly amended so as to cover the interest of the appellant, cited *Witte v. Meyer*, 11 Wis. 295; *Challoner v. Howard*, 41 id. 355; *Kerrick v. Ruggles*, 78 id. 274; *Sherry v. Schraage*, 48 id. 93; *Huse v. Washburn*, 59 id. 414; *Mark Paine L. Co. v. Douglas Co. Imp. Co.* 94 id. 322; *Stacy v. Bryant*, 73 id. 14.

PINNEY, J. 1. We do not think that any of the cases in this court cited and relied on by plaintiff's counsel support or justify the amendment of the claim for a lien allowed by the court. There was no allegation or hint in the claim, as filed, of an intent to assert a lien on the fee-simple interest of the defendant *Henry*, the landlord, upon the premises. It mentioned and referred only to the leasehold interest in the premises of J. H. Reysen & Son. It did not disclose who was the owner in fee. Four years afterwards, when the case had been tried before the referee upon the application for a

judgment, the court directed the amendment of the claim for a lien, and the complaint as well, so as to assert a claim to a lien not only upon said leasehold interest of J. H. Reysen & Son, but upon the distinct and separate property and estate in fee of the defendant *Henry*, who had not theretofore even been mentioned in said petition or claim, and judgment was given against his fee-simple estate accordingly. The time within which a lien or claim could be filed, if one could be filed against his estate under the statute, had expired. The action of the court was not the correction of a mistake, or misdescription, or failure to properly describe the interest of J. H. Reysen & Son, or of any one claiming under them. It was an entirely new proceeding, taken after the time limited for it by the statute had expired. The claim, as originally filed, as against *Henry's* fee-simple estate, was wholly inoperative and a nullity. *Knox v. Hilty*, 118 Pa. St. 430; *Bartley v. Smith*, 43 N. J. Law, 321. There was nothing to amend by, and the ruling of the circuit court carried the doctrine of amendment to an extent entirely unwarranted. As was said in *Fairchild v. Dean*, 15 Wis. 210, "to supply the defect requires creation, not amendment."

2. The lease from the defendant *Henry* of the premises for fifty years created the relation of landlord and tenant between him and the Reysens, so that by ch. 466, Laws of 1887, amendatory of ch. 349, Laws of 1885, and ch. 442, Laws of 1887 (S. & B. Ann. Stats. secs. 3314, 3314*a*), the plaintiff could not have a lien upon the property in question. The object of the statute was to prevent the estate or interest of the landlord being incumbered by liens under this statute by the contract or action of the tenant. No contract relations existed between the plaintiff and the defendant *Henry*. The consent of the landlord to such improvement cannot countervail or overcome the manifest purpose and intent of the statute. Laws of 1887, ch. 466. The referee found that under the lease of February 4, 1890, the defend-

ants Reysen had a leasehold interest in the premises therein described, but the court added to this finding that "such lease does not create the relation of landlord and tenant, *so as to deprive the plaintiff of its lien* against the interest of said defendant *Henry*." This is a conclusion of law, and we think it is an erroneous one. The lease created the relation of landlord and tenant between the parties. This relation "subsists by virtue of a contract, express or implied, between two or more persons, for the possession of lands or tenements, in consideration of a certain rent to be paid therefor." Taylor, Landlord & T. § 14; *Bentley v. Adams*, 92 Wis. 392. The language of the statute is general, and no exception can be read into it. There was no agreement in the lease, or contemporaneous with it, binding the tenants to build a mill on the premises or make other improvements. The agreement for a loan or advance money to build on or improve the property was not made until more than a year after the lease, and did not, in any respect, relate to the same subject matter, so as to entitle these documents to be read or considered together, nor did the lease contemplate the construction of a mill or other improvement on the premises for the benefit of the lessor, *Henry*. The cases of *Cook v. Goodyear*, 79 Wis. 606, and *Bentley v. Adams*, 92 Wis. 386, are clearly distinguishable from the present case.

3. The mill had been commenced and the contract entered into between the plaintiff and the Reysens for the furnishing of the mill machinery to be placed in the building before the defendant *Henry* agreed to loan the Reysens $8,000 to enable them to erect the building and to make the payments on the contract with the plaintiff. Within the case of *Vilas v. McDonough Mfg. Co.* 91 Wis. 607, the mortgage lien of the defendant *Henry* for $8,000 and interest is subordinate to the plaintiff's lien on the leasehold interest of the Reysens. As nothing was ever advanced under the sec-

ond mortgage for $2,000, the defendant *Henry* is in no position to complain of the judgment of the court in respect to it.

4. There was no privity of contract between the plaintiff and the defendant *Henry*, so as to enable him to insist that there could be no recovery on the contract between the plaintiff and the Reysens, for want of performance of its conditions, as in *Forster L. Co. v. Atkinson*, 94 Wis. 578, and the defendant *Henry* made no such defense in his answer. His mortgage interest in the leasehold was subject, therefore, to the amount that might be found due the plaintiff, and for which it was, or would be, entitled to a lien thereon.

In the absence of fraud or unlawful combination, we do not perceive that the Reysens would be precluded from waiving strict performance of the plaintiff's contract, and adjusting its claim on fair and equitable terms. There is no evidence of fraud or injustice in the plaintiff's claim, and, if the contention of the defendant *Henry* is maintainable, the record contains no evidence to show what deduction, as against him, if any, ought to have been made from its claim. It is unnecessary, therefore, to give this point further consideration.

Our conclusion is that the part of the judgment appealed from which determines that the plaintiff's claim be a lien upon the estate of the defendant *Henry*, as owner in fee of the premises therein described, and directs the sale thereof, is erroneous and must be reversed, and that in all other respects the judgment should be affirmed.

By the Court.— Judgment is ordered accordingly.

BARTLETT, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

May 5 — May 21, 1897.

Railroads: Failure to operate spur track: Ownership: Pleading: Consideration.

1. A complaint in an action against a railway company for failure to operate a spur track to a warehouse under sec. 1802, R. S., which fails to show that the plaintiff constructed or owns the track, does not state a cause of action, the duty of railroad companies to operate such tracks under that section being limited to those provided by the person desiring the service.
2. Although a railroad company constructed a spur track in a public street especially for the benefit of the owner of a warehouse, and such track had been improved and graded by him, a promise by the railroad company to continue to operate it for his benefit would be without consideration.

APPEAL from an order of the circuit court for Fond du Lac county: N. S. GILSON, Circuit Judge. *Affirmed.*

The action is to recover damages for the refusal of the defendant to operate a spur track for the plaintiff's benefit. The complaint alleges, in substance, that the plaintiff is the owner of a large warehouse, used for handling and shipping hay, situated on Brooke street, in the city of Fond du Lac. The main track of the defendant's railroad is in the same street near its center. Prior to November, 1874, when the plaintiff became the owner of the property on which his warehouse stands, there was a spur track from the defendant's main track to the warehouse which then stood upon the grounds now owned by him, which had been "constructed for the use and benefit of the owners of said property and said warehouse." It is not alleged by whom this spur track was constructed or maintained. Soon after the plaintiff purchased the property, he improved and graded the spur track at his own expense; and it was put in repair, and used and

operated by the defendant for the convenience of plaintiff's business until June, 1893. Then the defendant moved its depot and made some changes in its tracks. This spur track was extended along the east side of Brooke street, past the plaintiff's property, and connected at that end with the main track by a switch. The plaintiff objected to this extension and union with the main track. It was agreed that the change would not interfere with the use of that part of the spur track which had theretofore been used for the convenience of plaintiff's business, and that it should continue to be operated for the use and benefit of the plaintiff, as it had been theretofore operated. The spur track was extended along Brooke street parallel to the main line, with which it was connected by a switch at either end. The defendant also constructed another track from its main track, which connected with the spur track. This track was so located that, when cars are passing over it, there is room on the spur track for no more than one car to stand, where formerly six cars could stand and be loaded. The defendant now runs its regular trains over this last-mentioned track and the extension of the spur track mentioned, which prevents the use of the spur track by the plaintiff for the purposes of his business. The defendant also uses the spur track by switching passenger coaches thereon and running freight trains over it. The defendant has neglected and refused to operate the spur track for the plaintiff's benefit, and now refuses to so operate it. The defendant has also refused to furnish the plaintiff cars, and to permit him to use the spur track as he had been accustomed to do. The plaintiff has been all the while ready to pay for the maintenance and operating of the track, but the defendant has never made a demand therefor. The plaintiff's property, with the track maintained and operated as aforetime, would be worth $25,000. Without the track so operated, it is worth not to exceed $5,000. Judgment for $25,000 is demanded. There was a general demurrer to the

complaint, which the court sustained, and the plaintiff appeals.

The cause was submitted for the appellant on the briefs of *John Brennan*, and for the respondent on that of *Fish & Cary*.

NEWMAN, J. The real ground on which the plaintiff bases his claim to recover is not entirely clear. It is certainly not among the general duties of a railroad company to furnish and operate spur tracks to the warehouses of its patrons. While it is its duty to carry, without discrimination, every man's goods, when delivered for carriage at its depots or warehouses, it is under no obligation to receive them for carriage elsewhere. If any patron wishes special accommodations, he must buy them. He can compel them only by force of some contract or in pursuance of the statute. No doubt the burden is on the plaintiff to show affirmatively that the defendant, on one or the other ground, owed to him the duty to maintain and operate the spur track. Unless his complaint state facts which show that the defendant owed him such duty, it is demurrable, and the demurrer was properly sustained.

The statute referred to (sec. 1802, R. S.) is as follows: "The owner of any elevator, warehouse or mill, at or near any station or terminus of any railroad, may, at his own expense, construct a railroad track from such elevator, warehouse or mill, to such railroad, and connect with the same by a switch at a point within a reasonable distance from such station or terminus, and the railroad corporation shall allow such connection. Such side track and switch shall at all times be under the control and management of, and be kept in repair and operated for the benefit of, such owner or his assigns by such corporation; but the actual cost of so maintaining and operating the same shall be paid monthly by the owner thereof; and in case of his neglect to so pay

the same upon demand, the obligation of this section upon any such corporation shall cease until such payment be made in full." The statute contemplates that the owner of the warehouse to be accommodated shall provide his own track, and requires the railroad corporation to operate, for his benefit, the track which he has so provided. If the corporation constructs its own track to its patron's warehouse, to serve its own interest, that case is not within the terms of the statute. The statute does not require the corporation to operate its own tracks for the special or exclusive benefit of any one of its patrons; but it may operate its own track for its own benefit, and may change its use to better accommodate its own business and occasions. The evident purpose of the statute was to provide for the compulsory operation, by the corporation, of the warehouseman's own track, for the benefit of his business. It does not seek to regulate the manner in which the corporation shall maintain or operate its own tracks.

It does not appear by the complaint who constructed nor who owns this track. No facts are alleged from which such facts can be inferred. The only facts which might seem to bear on that question are that the track is in the street on which the plaintiff's warehouse fronts, and was constructed for the benefit of the owner of the warehouse. But the defendant's other tracks are in the same street, in front of the same warehouse, and were constructed for the benefit of its patrons. And, even if the defendant should have constructed this track especially for the benefit of the owner of the warehouse, that does not bring the case within the conditions of the statute, and does not establish a perpetual duty on the defendant to operate it for the benefit of that property. The improving and grading done by the plaintiff, after the track had fallen into disrepair, is of little significance; and, unless the plaintiff owned this track, there was no consideration for the defendant's alleged promise to continue to operate it

for his benefit. It could do what it would with its own, without consulting the plaintiff or asking his consent. So it is considered that, because the complaint does not show either who constructed this track or who owns it, it fails to show a case within the statute; and, for the same reason, it fails to show a consideration which would support an agreement to continue to operate the track for the plaintiff's benefit.

By the Court.— The order of the circuit court is affirmed, and the cause is remanded for further proceedings according to law.

IN RE WILL OF LYON.

May 5 — May 21, 1897.

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Wills: Witnesses: Wife of executor: Revocation: Marriage of testatrix.

1. The wife of the executor of a will is a competent witness thereto, since the executor, as such, takes no beneficial interest under the will.
2. The marriage of a woman does not revoke a will previously made by her, the common-law rule in that regard having been changed by the statutory removal of her disabilities in respect to the disposition of her property.

APPEAL from a judgment of the circuit court for Sheboygan county: N. S. GILSON, Circuit Judge. *Affirmed.*

Gertrude S. Cole, a widow, of Sheboygan, Wisconsin, made her will, devising her estate to Alice A. Sully and Clara A. Sully. She appointed *George C. Cole* executor. His wife signed as one of the two attesting witnesses. She afterwards married *Charles E. P. Lyon*, and thereafter died without issue, leaving the aforesaid will as her only testamentary disposition of her property. Such proceedings were duly had between the proponent of the will on the one side, and *Charles E. P. Lyon* as contestant on the other, that a

judgment was entered, on findings covering the aforesaid facts, in the circuit court for Sheboygan county, establishing such will. From such judgment the contestant appealed.

Paul T. Krez, for the appellant.

For the respondent there was a brief by *Willard C. Cole*, attorney, and *Francis Williams*, of counsel, and oral argument by *Mr. Williams*.

MARSHALL, J. It is assigned as error for a reversal of the judgment that the trial court should have held the wife of the executor not a competent attesting witness and the will void on that account. The executor was not beneficially interested so as to affect the competency of the wife to testify either by common law or by statute. See Redf. Wills, 257, 259; *Millay v. Wiley*, 46 Me. 230; Cassoday, Wills, §§ 190, 192; *Bettison v. Bromley*, 12 East, 250. She was competent to testify to the facts at the time the will was executed, and that satisfies the universal test. Cassoday, Wills, § 177; Schouler, Wills, § 351; *In re Holt's Will*, 56 Minn. 33. The question is one that has been so long settled that no extensive discussion of the subject seems to be warranted.

It is further assigned as error that the court should have decided that the subsequent marriage of the testatrix revoked the will by operation of law. Sec. 2290, R. S., provides, in effect, that wills may be revoked, by implication of law, by subsequent changes in the condition or circumstances of the testator. That merely preserves the common-law rule on the subject, except as abrogated by implication in the manner hereafter stated. At common law the marriage of a woman revoked her will previously made, but such rule is generally (there are exceptions) held to have been changed by the statutory removal of her disabilities in respect to the disposition of her property. *Noyes v. Southworth*, 55 Mich. 173; *Roane v. Hollingshead*, 76 Md. 369; *In re Hunt, Emery, Appellant*, 81 Me. 275; *Morton v. Onion*, 45 Vt. 152,— cited

by respondent's counsel. Also, *In re Tuller's Will*, 79 Ill. 99; *Fellows v. Allen*, 60 N. H. 439; *Hoitt v. Hoitt*, 63 N. H. 475. Formerly, the marriage of a man after the making of a will, and the birth of issue, by operation of law revoked the will. The inequality between the sexes in this regard grew wholly out of the change that marriage worked in the capacity of the woman to dispose of her property. Upon that being removed by statute in this and many other states, the inequality in the rule, as a necessary and natural result, ceased.

Though the authorities are not all one way, they greatly preponderate in favor of the views above expressed. Moreover, the subject is not open to discussion here, the point having been decided in *Ward's Will*, 70 Wis. 251, where it is said, in effect, that, the statutes of this state having conferred upon married women the absolute power of disposing of their property by last will and testament without the consent of their husbands (secs. 2277, 2281, R. S.), that removed every reason upon which the common-law rule of revocation by marriage subsequent to the making of a will was based; hence such rule was, by implication, removed by the same statute. To be sure, in the case of *Ward's Will*, the fact was that the testatrix had children by a former husband, and the court reserved the question of whether, in the absence of children, the common-law rule would not prevail, inasmuch as the husband is, under our statutes, heir of his wife, as well as the wife of the husband; but we do not think the statute in relation to inheritance makes any difference. The inequality formerly existing grew out, as stated, of the inequality in the capacity of the sexes to dispose of their property after marriage. That has been removed by a change in the capacity of the wife; hence the common-law rule as to the husband remains, and that of the wife has been changed by implication to conform to it.

In England and many of the states this whole subject is now regulated expressly by statute to the effect that marriage subsequent to the execution of a will revokes it, whether

made by a man or a woman. Judicial decisions in such jurisdictions furnish no authority here, where the common law still prevails, except as changed by implication in the manner heretofore indicated.

It follows from the foregoing that the wife of the executor was competent to witness the execution of the will, and that the subsequent marriage of the testatrix did not revoke it, and that the judgment of the trial court should be affirmed.

By the Court.— So ordered.

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THE GERMAN BANK, Respondent, vs. MUTH, imp., Appellant.

May 5 — May 21, 1897.

Mortgages: Setting aside for fraud: Failure to ascertain contents: Husband and wife.

In a proceeding by the wife of a mortgagor to set aside the mortgage so far as it affected her dower and homestead rights in a portion of the land, she testified that she could read English print with difficulty and English script not at all; that she intended to execute the instrument, but that she had been induced by her husband to believe that the mortgage covered his store property only. The mortgage was regular upon its face, and no fraud was charged against the mortgagee. The attorney who took the wife's acknowledgment testified that he either read the mortgage to her, or asked her if she knew its contents, and she had replied that she did, basing his testimony upon the fact that he never took an acknowledgment without doing one or the other. *Held*, that a finding that the wife voluntarily executed the instrument knowing its contents should not be disturbed on appeal.

APPEAL from a judgment of the circuit court for Sheboygan county: N. S. GILSON, Circuit Judge. *Affirmed.*

The facts are stated in the opinion.

Alexander Meggett, for the appellant.

Francis Williams, for the respondent.

CASSODAY, C. J. It appears from the record: That April 1, 1893, the defendants Henry and *Ernestine Muth* executed and delivered to the plaintiff a mortgage, to secure an indebtedness of $10,000 and interest, upon three separate pieces of real estate, one known as the store property, another as the homestead, and still another as two lots. That, default having been made in the payment, this action for the foreclosure of the mortgage was commenced January 28, 1895. That such proceedings were had therein that judgment was entered upon the default of all the defendants, April 18, 1895, for $10,740.60. That February 28, 1896, that judgment was, upon motion of the appellant herein, vacated and set aside as to her, so far as it covered the homestead and her inchoate right of dower in the two lots mentioned. That among such motion papers is an answer of the appellant to the effect that she had but little experience in business matters; that she was able to read printed English with difficulty, and written English not at all; that she was requested to sign the mortgage by her husband, who told her it covered his store property; that, for the purpose of obtaining her signature to the mortgage, her husband deceitfully concealed from her the fact that the mortgage was also upon the homestead and upon the two lots mentioned; that she did not intend to make or give a mortgage upon her homestead, nor upon said lots, and did not know that they were included in the mortgage so given; that she was not indebted to the plaintiff in any sum; that the indebtedness secured by the mortgage was for money loaned to her husband long prior to the execution of the mortgage. That upon the issues raised by such answer the case was tried by the court. That at the close of the trial the court found, as matters of fact, in effect, that the defendants Mr. and *Mrs. Muth* executed under their hands and seals, and delivered to the plaintiff, the mortgage in question; that said mortgage was duly attested by two sub-

scribing witnesses, and duly acknowledged, so as to entitle the same to be recorded, and was duly recorded, as set out in the complaint; that *Mrs. Muth* signed, acknowledged, and delivered the said mortgage knowing at the time that the same covered the property therein described, including her homestead, and that she was not deceived or misled as to the property therein described; that all the material allegations in the complaint are true; and that all the material allegations in the answer of *Mrs. Muth* are unproven and untrue. And as conclusions of law the court found that the plaintiff was entitled to the relief demanded in the complaint, and ordered that judgment of foreclosure and sale in usual form be entered. From the judgment entered thereupon accordingly for the amount due on the mortgage, the defendant *Mrs. Muth* brings this appeal.

The question whether *Mrs. Muth* executed the mortgage voluntarily, or was induced to do so in ignorance of its contents, by the deception and false pretenses of her husband, was fairly tried by the court, and the findings are against her. These findings seem to be sustained by the evidence. It is true that her husband was not her agent for the purpose of such execution, nor was he the agent of the plaintiff. In the absence of fraud or mistake, she was conclusively presumed to know the contents of the mortgage, and was bound by the description therein contained. *Fuller v. Madison Mut. Ins. Co.* 36 Wis. 603; *Morrison v. Phillips & C. Const. Co.* 44 Wis. 410; *Sanger v. Dun*, 47 Wis. 620; *Herbst v. Lowe*, 65 Wis. 321; *Loibl v. Breidenbach*, 78 Wis. 53, 54. The mere fact that she could only read printed English, but could not read written English, is no excuse. It was, at most, negligence on her part. *Id.* The formal execution and acknowledgment of the mortgage are fair and regular upon their face, and are not impeached. According to the testimony on her part, her husband told her that the mortgage covered the store, but failed to tell her that it also cov-

ered the homestead and the two lots. She admits that she intended to execute and acknowledge the mortgage, but claims that what her husband said and did induced her to believe that it only covered the store property. The good faith and fair conduct of the plaintiff are not questioned. To impeach the mortgage upon such ground, the evidence should be clear, convincing, and satisfactory. *Smith v. Allis*, 52 Wis. 345, and cases there cited; *Portz v. Schantz*, 70 Wis. 503; *Gabbey v. Forgeus*, 38 Kan. 62; *Ramsburg v. Campbell*, 55 Md. 227. In *Insurance Co. v. Nelson*, 103 U. S. 544, "a suit was brought to foreclose a mortgage made by husband and wife of land, a part of which belonged to him and a part to her. Her answer sets up that he obtained her signature by physical violence, and that he and the officer who took her acknowledgment, both of whom died before her answer was filed, represented to her that the mortgage did not cover her land. Held, that her testimony is not sufficient to impeach the mortgage." The notary public who took the acknowledgment is a well-known member of the bar, and he states that he either read the mortgage to her or asked her if she knew what it contained, and that she answered that she did. Of this he is very positive, for the reason that he never took an acknowledgment without either reading the paper to the person executing the same, or asking such person whether he knew the contents, except when he drew the paper himself in the presence of the person executing the same, and who knew all about it. We cannot disturb the findings of the court.

The suggestion that there cannot be two judgments in the case is not here involved, since there is but one judgment as against *Mrs. Muth*, and she is the only one who has appealed.

By the Court.—The judgment of the circuit court is affirmed.

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WELTON, Appellant, vs. POYNTER and another, Respondents.

May 5 — May 21, 1897.

Ejectment: Disputed boundary: Location of government line: Presumptions: Voluntary location of boundary.

1. Evidence of undisputed occupation and fencing for about thirty years in accordance with measurements based upon a reputed government quarter-section line, not only of the piece of land in controversy but of other parcels in that immediate neighborhood, raises a presumption that the line so recognized is the true one; and such presumption is not overcome by evidence that upon a resurvey, based upon no monuments, another line several rods distant was established.
2. In an action of ejectment involving a disputed boundary, evidence — showing, among other things, that the plaintiff and those through whom he claimed had for nearly thirty years held under deeds describing the eastern boundary of their premises as eight rods east of a certain quarter-section line, and that for such time a fence had stood upon a line eight rods east of the reputed quarter-section line, and plaintiff and his grantors had occupied up to such line fence and no further, without controversy — is *held* sufficient to show a location of the true line by the parties, followed by such long acquiescence as to make it binding on them and their privies.

APPEAL from a judgment of the circuit court for Richland county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

The facts are stated in the opinion.

For the appellant there was a brief by *Miner & Miner*, attorneys, and *L. H. Bancroft*, of counsel, and oral argument by *Mr. Bancroft* and *Mr. J. H. Miner*.

F. W. Burnham, for the respondents.

WINSLOW, J. This is an action of ejectment for a piece of farm land about five rods in width and fifteen rods in length. The question is really one of the location of the boundary line between the plaintiff and defendants. The plaintiff's lands are west of, and immediately adjoining, the defendants'

lands. The plaintiff's line on the east, according to his deed and the deeds of all his grantors for nearly thirty years, is a north and south line eight rods east of a certain quarter-section line. For the same length of time this line has been supposed to be marked by a fence which stands eight rods east of a line which for the same length of time, and probably longer, has been reputed to be the said quarter-section line. The occupation of the plaintiff and his grantors for nearly thirty years has been up to this fence and no further, without controversy. Other conveyances of land in the same and the adjoining quarter section have been made with reference to this reputed quarter-section line, and fences built in accordance therewith, which have stood many years and still stand. There is no evidence as to the existence of any stakes or bearing trees, or other monuments showing the original location of the line. In 1895 a survey was made by the county surveyor, and he testified that he located the line five rods east of its ancient reputed location; but he does not state how he located it, from what point he started, or whether he found an original stake or monument.

While it cannot be positively asserted that the reputed quarter-section line is located upon the line as originally surveyed, the evidence of undisputed occupation and fencing in accordance with that line for about thirty years, not only of the piece of land in controversy but of other parcels of land in that immediate neighborhood, raises a presumption that the line so recognized is the true line and is located upon the line of the original survey. *Racine v. Emerson*, 85 Wis. 80, and cases there cited. So strong a presumption is thus raised in the present case that we do not regard it as overcome or seriously weakened by the simple fact that upon a resurvey, based upon no original monument, another line several rods distant is established. Furthermore, we think that the evidence here is sufficient to show a location by the parties of the line between their holdings, with the

obvious intention of making it the true line, which has been followed by such long acquiescence as to be binding upon the parties and their privies. *Pickett v. Nelson*, 71 Wis. 542–546; Newell, Ejectment, 559, 560.

The judgment for the defendant was right, and must be affirmed.

By the Court.— Judgment affirmed.

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ANDREWS, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

May 6 — May 21, 1897.

Railroads: Injury to employee coupling cars: Special verdict: Proximate cause: Custom: Construction of statute: Improper remarks of counsel: How error may be cured.

1. In an action against a railroad company for personal injuries sustained by an employee, a special verdict finding that the injuries were occasioned "by reason of, and as the direct consequence of," the neglect complained of, but not finding that the injury was also the *probable* consequence of such negligence, or that a person of ordinary intelligence, under the circumstances, ought reasonably to have anticipated that injury to the plaintiff would probably result therefrom, is insufficient to establish that such negligence was the *proximate cause* of the injury.

2. In an action by a helper on a switching crew to recover for injuries received while attempting to couple a car which had been kicked down a side track upon a down grade, and alleged to have been caused by the negligence of the foreman in kicking a second car down the same track without warning so that it struck the first car before the coupling had been completed, plaintiff's evidence was to the effect that his first attempt to couple the cars had been unsuccessful, and that as the car returned after rebounding he made a second attempt without coming out from between the cars; but the evidence whether it was customary so to do was in dispute. *Held*, that a refusal to submit for special verdict the question of the existence of such custom was a material error.

3. Ch. 220, Laws of 1893 (regulating the liability of railroad companies for injuries received by employees in the course of their employment), was not designed to make the company an insurer against injuries naturally and usually incident to employment as railway operatives, by excluding all question as to assumption of such risks; nor did the limitation of liability to injuries received "without contributory negligence" on the employee's part require contributory negligence to be pleaded as a defense or shift the burden of proof in that regard.

4. Impropriety in the argument of counsel to the jury will not be cured by the mere formal announcement that objection thereto is sustained, but to have that effect the court must at once, and plainly, direct the jury to disregard the objectionable remarks.

APPEAL from a judgment of the circuit court for Iowa county: GEO. CLEMENTSON, Circuit Judge. *Reversed.*

This action was brought under ch. 220, Laws of 1893, by the plaintiff, an employee of the defendant as a helper in the day switching crew of the defendant company, in its yard at Madison, Wisconsin, to recover damages for an injury sustained by him, while in the line of his duty, in consequence of the alleged negligence of the foreman of said crew, one Roach, by reason of which the plaintiff's left hand was crushed, and it became necessary to amputate his arm above the wrist. The complaint charged, as the cause of his injury, negligence on the part of the plaintiff's fellow-servants or co-employees, and in particular of Roach, the foreman of the day switching crew, in the yard in which the plaintiff was engaged, for failing to follow the rules and custom governing switching therein, and that such negligence was the proximate cause of the plaintiff's injury, and asserted that the plaintiff was free from contributory negligence.

It was found by the special verdict, among other things: (1) That at the time of the injury, and for a number of years prior thereto, it was the practice and custom, in making up trains in the yard, for the helper, when a car was kicked

back to be connected with other cars, to catch the car so kicked back and ride it down to the other cars, and to make the coupling then and there, if he could. (2) That at the time of the plaintiff's injury, and prior thereto, it was the practice and custom, in the yard, for the foreman of the switching crew, after kicking back a car to be so coupled, not to kick back another car upon the same track until the helper who had gone with the first car had come out from between the cars, so that the foreman could see that he was in a position to catch the next car. (3 and 4) That the plaintiff and Roach, the foreman, at the time knew of the custom in these respects. (5) That the plaintiff, after he had ridden the refrigerator car down to near the stock car, alighted and went between these cars to couple them. (6) That while between said cars a car was kicked down the main track and struck the refrigerator car, driving it and the stock car together. (7, 8, and 9) That at this time the plaintiff was trying to make the coupling, and his left hand, by reason of the cars being so driven together, was caught between the drawheads and crushed, the plaintiff being in the line of his duty, and exercising ordinary care under all the circumstances. (10, 11, and 12) That Roach, the foreman, caused the car which struck against the refrigerator car to be kicked down the main track, and knew at the time that the plaintiff had gone down that track with the refrigerator car to couple it to the stock car; that, in causing the car which struck the refrigerator car to be kicked back at the time he did, he was guilty of negligence. (13) That the plaintiff's hand was crushed while he was between the stock car and the refrigerator car, *by reason of, and as the direct consequence* of, the negligence of Roach. The plaintiff's damages, if entitled to recover, were fixed at $6,000.

The defendant had asked that the following questions be severally submitted to the jury as a part of the special verdict, but they were each rejected, namely: (5) Ought a man

of ordinary intelligence and prudence, engaged in the business then followed by said Roach, to have reasonably expected, under the attending circumstances, that such violation of said custom at the time and place in question would result in a bodily injury of some kind to the plaintiff? (7) At the time the plaintiff was injured, had it, for a great many years, been the uniform custom of all helpers in switching crews in defendant's yard at Madison, who have gone between cars to couple them, to come out again immediately if they failed to make the coupling the first time, and look for coming cars?

After verdict, the defendant moved, upon the minutes, to set aside the verdict and for a new trial, upon its exceptions, and because the verdict was contrary to the law and the evidence, because the damages were excessive, and because the verdict did not cover all the issues. This motion was denied, and, upon plaintiff's motion, judgment was given on the verdict for the plaintiff.

The principal questions for consideration on this appeal are: First, whether the special verdict contains a sufficient finding that the negligence found by the jury was the proximate cause of the plaintiff's injury; second, whether the court erred in refusing to submit to the jury questions Nos. 5 and 7 proposed by the defendant. No instructions were given by the court to the jury upon the question whether the negligence of the defendant was the proximate cause of the plaintiff's injury.

It appeared in evidence that there were several side tracks north of the main track in the Madison yard, designated by numbers, and they have a slight descending grade towards the east. The train in question was a way freight from the west, consisting of twenty-two or twenty-three cars, and drew in from the main track on the side tracks 8 and 7. Plaintiff was a helper in defendant's day switching crew at Madison, which consisted of the foreman, Roach, and him-

self and Charles Mahaney as helpers. After setting out the caboose, the train was pulled west, until about half of it was on the main track, when it was separated in the middle, so that the westerly car of the east half stood over on the main track something like four feet. That was a stock car, and the brake on it was set. The west half of the train was then pulled west beyond switch 10, and a refrigerator car thrown down the main line. After it passed No. 10 switch, the plaintiff threw that switch back on side track 10, and ran and caught the refrigerator car, and rode it down, setting the brake on the east end of it; and, when it was about six or seven feet from the stock car mentioned, he alighted from it, and went to the stock car, standing there, facing east, with his left hand grasping the slats of the stock car; and, as the refrigerator car came up, he seized the link in its drawbar with his right hand, and entered it into the drawbar of the stock car, but failed to make the coupling, because, as he testified, of the difference in the height of the drawbars, of one to two inches. The refrigerator car recoiled back twelve to nineteen inches, and commenced returning slowly again; and while it was moving, and within that distance of the stock car, and the space was not over five or six inches between the end of the link and the stock-car drawbar, he attempted to change the link from the refrigerator car to the stock-car drawbar by reaching back and grasping the link with his left hand and the pin with his right, when another car, sent down on the main track, struck the refrigerator car all of a sudden, and it caught his hand. He testified that he had just got the link out of the refrigerator car when the car struck and his hand was caught. Evidence was given tending to show that it was dangerous to attempt to change a link within the short space and under the circumstances stated; that it was likely to result in the helper's hand being caught. It appeared from the evidence that the plaintiff had worked for about twenty years in the railway

service, and for about three years in the Madison yard. On the part of the plaintiff, the evidence of four witnesses was given, in substance: That the duties of the foreman were to get the switching list and proceed to switch the train, and to see that there were brakes on all cars before they were cut off, and that there was a man in position to catch the cars before he cut them off, and to see if there was a man in between the cars making a coupling, and to hold the cars until he saw that man out safe before sending down another car. The foreman cuts off the cars by pulling the pin. The helper throws the switches under the foreman's directions, and rides cars and couples them, and does the general work around the yard. When a car is kicked down, a helper gets onto it and rides it down, slacks it up before it strikes another car, and then gets down and makes the coupling, if he can; that is done by entering the link into the drawbar and setting the pin, and in two or three seconds. If he misses the coupling and the car stops still, then he is to set the pin and link so they will couple themselves when the cars are moved again. If the car moves back after it strikes, and then starts to move down grade again, as in this yard, the helper is supposed to stay in there and make the coupling; and, while in there for that purpose, it is the foreman's duty not to kick a car down on the same track unless he has a man to ride it down, when it is the duty of the man riding it down to stop the car before it strikes, when he sees that a man has gone in there and that he has not come out. Such was the custom at that time, and had been for several years.

The plaintiff testified that, when the refrigerator car was cut off, he caught it and rode it down; and he described his proceedings substantially as already stated, and said that there was a link in the refrigerator car as it came down, and none in the stock car; that he had hold of the link and steered it into the drawbar of the stock car,— got the link in; that he seized the pin, tried to get the pin down through

it, but could not, and the refrigerator car bounded back about eighteen or nineteen inches; that, when he held the link there between those two drawbars, there was a distance in addition to the length of the link, of five or six inches between the end of the link and the drawbar; that when the car went back he noticed the drawbars, and one was higher than the other; that he caught the link with his left hand, and the pin with his right, and tried to change the link from the refrigerator car to the stock car, and got the link about five or six inches out of the refrigerator-car drawbar, but not into the stock-car drawbar; that, when the car bounded back, it stopped, and then started to move down very slowly; that another car was thrown down the main line and struck the refrigerator car, when his hand was caught between the cars; that it moved the cars six or eight feet, and himself along with them; that he had to walk with his hand between the drawbars; that when he started to catch the refrigerator car, going down the main line, Roach started to cut a car off; that from his position he could see plainly down the track to where he (the plaintiff) was; that it was the usual practice and custom in switching and coupling cars, when the first coupling is not made, for the helper to stay in between and make a second attempt to couple the cars when they came together again.

On the part of the defendant, proof was given by several witnesses (present and former employees in said yard) that it was the general custom and practice in the yard to throw or kick down cars, one after another, upon the different tracks, without stopping to wait between cuts to see if helpers had come out from between the cars; that when the helper goes in between cars, and misses a coupling for any reason, it is his duty to come out before attempting to make it again, so that, if he is watching for another cut, he can catch it, if it is coming, and ride it down; that if a car that is cut off approaches a stationary car and hits it, and the

helper fails to make a coupling, it is his duty, even if it should bound back sixteen to eighteen inches, to come out before attempting to make that coupling again, and see that there is nothing else following that car that he is trying to couple; that it was the custom and practice in that yard to back in with the engine, and make up the missed couplings after the train is switched; that the duties of the helpers are to catch cars, and attend switches, and do what coupling they can; that, as between the approaching car and the coupling, it is the helper's duty first to attend to catching the car; that it was not the duty of the foreman to look out for his helpers; that the custom and practice in the yard was for each one of the crew to look out for himself; that they are supposed to look out for themselves; that they had never heard of any custom that required the foreman to wait between cuts, in sending down cars, to see whether his helpers had come out from between the cars, and had made their couplings; that it is the duty of the helper, when he misses a coupling, to come out at once and look for another car.

For the appellant there was a brief by *Burton Hanson* and *Geo. W. Bird*, and oral argument by *Mr. Hanson*, *Mr. C. H. Van Alstine*, and *Mr. Bird*.

For the respondent there was a brief by *Bashford, O'Connor & Aylward*, and oral argument by *R. M. Bashford* and *J. A. Aylward*.

PINNEY, J. 1. The question presented by the special verdict is whether it is fairly and substantially found by it that the negligence of Roach, the foreman of the switching crew, imputable to the defendant, was the proximate cause of the plaintiff's injury. Unless this appears from the verdict, no judgment could be given on it, and a new trial would become necessary. This was so held in *Davis v. C., M. & St. P. R. Co.* 93 Wis. 482, in accordance with many previous

decisions, some of which were there cited. *Kerkhof v. Atlas Paper Co.* 68 Wis. 674; *Kreuziger v. C. & N. W. R. Co.* 73 Wis. 158; *McGowan v. C. & N. W. R. Co.* 91 Wis. 147. Many other decisions to the same effect have been made. *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141; *Block v. Milwaukee St. R. Co.* 89 Wis. 378; *Guinard v. Knapp-Stout & Co. Company*, 90 Wis. 123; *Deisenrieter v. Kraus-Merkel Malting Co.* 92 Wis. 164; *Klatt v. N. C. Foster L. Co.* 92 Wis. 624; *Kucera v. Merrill L. Co.* 91 Wis. 637; *Kutchera v. Goodwillie*, 93 Wis. 449. It is found "that the plaintiff's hand was crushed . . . by reason of, and as the *direct* consequence of, the negligence of Roach;" that is to say, that the plaintiff's injury was the natural consequence of the negligence of Roach, the foreman, and without the intervention of any independent agency or cause for which the defendant was not responsible. Was it necessary that it should also appear from the verdict not only that the plaintiff's injury was the direct, but the probable, result, as well, of the defendant's negligence?

The law is that the negligence of the defendant must have been the proximate cause of the injury, and the plaintiff was bound to establish this, as a necessary part of his case. When the statute providing for special verdicts was adopted, the universal rule that had theretofore existed in respect to general verdicts became at once applicable to special verdicts, namely, that a verdict must find the substance of the issue and be sufficient to support the judgment given on it, and this rule has ever since been inflexibly adhered to as to special verdicts. "A special verdict is that by which the jury find the *facts only*, leaving the judgment to the court." R. S. sec. 2857. It logically follows that the question of proximate cause, which is a fact essential to a judgment in favor of the plaintiff, must appear upon the face of the special verdict. If it does not, no judgment can be given on it. The real test of the defendant's liability for the plaint-

iff's injury is whether the negligence of its foreman was the proximate cause of the accident. "The negligence is not the proximate cause of the accident unless, under all the circumstances, the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident was the natural consequence of the negligence. It must also have been the probable consequence." *Block v. Milwaukee St. R. Co.* 89 Wis. 378. This subject underwent a careful consideration in *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 150–155. It was there held after careful consideration, adopting the rule laid down in the supreme court of the United States in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, as the rational and better rule, "that generally, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." 60 Wis. 161. This rule is supported by a great number of English and American cases there cited, and had been announced by this court as early as the case of *Kellogg v. C. & N. W. R. Co.* 26 Wis. 281. In *Sharp v. Powell*, L. R. 7 C. P. 253, it is declared that: "No doubt, one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not a natural or ordinary consequence of such an act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene, so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that

the wrongful act is not the proximate cause of the injury, so as to render the wrongdoer liable to an action." In *Atkinson v. Goodrich Transp. Co., supra*, the court closed the discussion of the question by saying: "We think that the decided weight of authority is in favor of the rule that in an action for negligence the defendant has the right to have the question submitted to the jury whether the result which is the ground of the action might, under all the circumstances, have been reasonably expected, not by the defendant, but by a man of ordinary prudence; and we think it very clear that no such question was submitted to the jury, either by the special verdict or by the instructions given. It would seem that it is not enough to prove that the result is the *natural* consequence of the negligence, although that fact would be *evidence* tending to show that it might have been reasonably expected." These remarks are strictly applicable to the present case, and show that the fifth question the defendant asked to have submitted to the jury was improperly refused. It is true that this question may be open to criticism, in using the words "would result," instead of "would be likely to result," etc., but the questions held to have been improperly refused in the *Atkinson Case* were subject to the same criticism. 60 Wis. 150. It is certain that the question was sufficient to call the attention of the trial court to the necessity, at least, of giving proper instructions on the subject of what would constitute proximate cause, but none were given.

Much stress was placed in the argument, by the plaintiff's counsel, upon the fact that the verdict finds that the plaintiff's injury was "the *direct* consequence of the negligence of Roach, the foreman." But this signifies, in our judgment, no more than that it was the *natural* consequence, and that there were no intermediate steps or links in the line of natural causation. While it may be evidence tending to show that the result was one which, in the light of attending circum-

stances, ought to have been reasonably foreseen as likely to occur in consequence of his negligence, it is by no means equivalent to a finding of that fact, indispensable, as we have seen, to show that his negligence, in a legal as well as in a natural sense, was the proximate cause of the plaintiff's injury. It is not equivalent to a finding that the injury was the probable as well as the natural result of the negligent act, or that it was an injury which, in the light of the attending circumstances, the foreman ought to have reasonably foreseen as likely to occur from the negligent act. To say, therefore, that the injury was the *direct* result of the negligence, is really no more than saying that it occurred in the natural line or chain of direct causation. The question of the sufficiency of this verdict has been settled by repeated adjudications, many of which have been already cited, and to which the following may be added: *Barton v. Pepin Co. Agr. Soc.* 83 Wis. 23; *McGowan v. C. & N. W. R. Co.* 91 Wis. 147; *Klatt v. N. C. Foster L. Co.* 92 Wis. 624; *Huber v. La Crosse City R. Co.* 92 Wis. 636; *Sheridan v. Bigelow*, 93 Wis. 426.

There need be no embarrassment or difficulty in conforming to the rule. The question whether the negligent act relied on was the proximate cause of the injury may be submitted by a question in substance in that form, and the court should instruct the jury as to what will constitute proximate cause, in view of the facts and circumstances, or it may be submitted to the jury to find the facts which show that within the rule, as stated, the negligence in question was, in a legal as well as a natural sense, the proximate cause of the injury, and was therefore actionable. Within these decisions, from which we are not at liberty to depart, it is plain that this verdict is fatally defective.

2. The evidence of six of the defendant's witnesses was such as to properly require the defendant's seventh question to be submitted to the jury. It related to matter within the

issue, not covered by any finding in the special verdict, namely, to the uniform custom of helpers in that yard, "who have gone between cars, to come out again immediately, if they failed to make the coupling the first time, and look for coming cars." It related entirely to the custom and duty of helpers, and had a material bearing upon the question whether the plaintiff, in the course he pursued in remaining between the cars, endeavoring a second time to couple them, on turning the link, when they were coming together again, was guilty of negligence which materially contributed to his injury. The effect of its rejection was to withdraw all evidence on the point of custom thus alleged from the consideration of the jury, and it doubtless prejudiced the defendant's case generally upon the subject of the custom that actually prevailed. There was testimony tending to show that an attempt to turn the link and make a coupling in the manner and under the circumstances stated, after having failed to make the coupling in the first instance, was a dangerous proceeding. Besides, the question proposed was material, as to whether the foreman, Roach, conceding that he was negligent in violating the custom as to his own duty, ought reasonably to have foreseen, in the light of the duty of the helpers and of the attending circumstances, that some injury would probably occur in consequence, to the plaintiff, from sending down, in the manner he did, another car after the refrigerator car. We think that the defendant was entitled to an answer to this question, and that it was error to refuse to submit it.

3. There is nothing in ch. 220, Laws of 1893, which to our minds indicates that it was intended to exclude from a case within its provisions all question as to the assumption of the risks or perils naturally and usually incident to the plaintiff's employment as a railway operative. It was not the design of the act to make the railroad company an insurer against injuries thus received by the plaintiff. There is no

question in the case as to the assumption by the plaintiff of any unusual or extraordinary risk.

4. The contention that under ch. 220, Laws of 1893, contributory negligence on the part of the plaintiff was required to be pleaded as a defense, is not maintainable. The defense of contributory negligence arises out of the facts and circumstances of the alleged injury. Before the statute, it was not necessary that it should be pleaded. *Cunningham v. Lyness*, 22 Wis. 245; *McQuade v. C. & N. W. R. Co.* 68 Wis. 616. It was not within the plan or purpose of the statute to make any change in the law of pleading. The statute relates only to questions of liability. The case of *Dugan v. C., St. P., M. & O. R. Co.* 85 Wis. 610, relates only to the burden of proof. The defense of contributory negligence would be sustained to an action under this statute, had it been silent on the subject. The mere fact that the words "without contributory negligence on his part" are in the act, when the courts would have supplied them if omitted, cannot operate either to change the rule of pleading or evidence. *Dugan v. C., St. P., M. & O. R. Co., supra.*

5. Nine pages of the printed case are directed to paragraphs in the arguments of the plaintiff's counsel to the jury, to objections to the same as improper, and rulings thereon. Of thirteen paragraphs objected to, in five instances the objection was sustained, and in still others there ought to have been a similar ruling. The general tendency of the objectionable remarks was to improperly prejudice and bias the minds of the jury, and stir up passion and resentment against the defendant; but, as there is to be a new trial, we have not thought proper to extend this opinion by a special statement of these matters. Counsel, in their vocation as such, are officers of the court, charged with important functions in the administration of justice. Theirs is a high and important trust, and in their zeal there are times when they are liable to become unmindful of the duty they owe to the

court and the cause of the administration of justice. The security of the verdict may be put in peril by the misconduct of counsel as well as of jurors. It is the duty of the trial court to bear a firm and steady hand, and see to it that the limits of just and fair discussion are not exceeded. We hold the proper rule to be — and in future cases will so apply it — that impropriety of conduct in these respects will not be cured by the mere formal announcement that the objection to it is sustained; but, to have that effect, the court must at once, and plainly, direct the jury to disregard the objectionable remarks.

It follows from the foregoing views that there must be a new trial.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

COOPER, Respondent, vs. THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Appellant.

96 362
102 224

May 6 — May 21, 1897.

Insurance against fire: Conditional ownership of single article: Divisibility of contract: Proofs of loss: Waiver: Verdict.

1. A policy of insurance which covers generally all the household goods of specified classes belonging to the insured on certain premises, but does not mention any particular article as the one to be protected, and which provides that the entire policy shall be void if the interest of the insured be other than sole and unconditional ownership, is not rendered void as to goods to which the insured's title is absolute by the mere fact that his title to one article thus generally described was conditional, the contract of insurance being to that extent divisible.
2. Unequivocal notification by the adjuster of an insurance company that, whatever the circumstances of the loss, the company declines to pay it, constitutes, as matter of law, a waiver of proofs of loss under the policy.

3. It is not a prejudicial error to take a general verdict in connection with a special verdict, when the special verdict disposes of all the controverted issues.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Affirmed.*

This is an action on a fire insurance policy for the loss of household goods. The goods intended to be insured were described in a printed slip, attached to the policy, as follows: "$600.00 on household and kitchen furniture, useful and ornamental, beds and bedding, linen, family wearing apparel, trunks, satchels, printed books and music, musical instruments, sewing machines, pictures, paintings, engravings and their frames at not exceeding cost, plate and plated ware, mirrors, china, glass, and crockery ware, fuel, family stores and supplies,—all and while in the above-described dwelling house." The policy also contained this provision relating to the title to the goods: "This entire policy, unless otherwise provided by indorsements thereon, or added thereto, shall be void . . . if the interest of the insured be other than sole and unconditional ownership." Within the life of the policy, the building in which the goods were kept, and the goods themselves, were destroyed by fire. The defendant denied liability, and action was brought. The defense was that proofs of loss were not furnished, and that the property was incumbered by a chattel mortgage at the time of the loss. There was a special verdict, by which it was found (1) that the chattel mortgage had been paid before the policy was issued; (2) that the plaintiff was not the sole owner of the sewing machine included in the loss; (3) that the defendant's adjuster, at the time when he came to adjust the loss, denied that defendant was liable for the loss; (4) that the adjuster did not object that certain papers handed to him were insufficient proofs of loss; (5) that the plaintiff had not been guilty of fraud or false swearing in reference to his loss; (6 and 7) that certain papers which

were in evidence were delivered by the plaintiff to the adjuster at the time when he came to adjust the loss; (8) that the value of the property totally destroyed was $475; (9 and 10) find generally for the plaintiff, and assess his damages at $500. The defendant's counsel requested the court to submit the further question: "Was it understood and agreed by the plaintiff and defendant's adjuster that any act or statement made by him at the time of his visit to La Crosse should not waive any of the rights of the company under the policy?"—which was refused; and he objected to the submission of a general verdict. Motion for a judgment on the verdict was made by both parties. The court required the plaintiff to remit from the verdict the price of the sewing machine, and gave judgment in his favor for $440, from which the defendant appeals.

C. L. Hood, for the appellant.

For the respondent there was a brief by *Higbee & Bunge*, and oral argument by *E. C. Higbee*. To the point that by his contract of sale the plaintiff was the sole and unconditional owner of the sewing machine within the terms of the insurance policy, they cited *Johannes v. Standard Fire Office*, 70 Wis. 196; *Carey v. Liverpool & L. & G. Ins. Co.* 92 id. 538; *Carey v. Allemania F. Ins. Co.* 171 Pa. St. 204; *Loventhal v. Home Ins. Co.* 33 L. R. A. 258; May, Ins. § 287; *North British Ins. Co. v. Freeman*, 33 S. W. Rep. 1091; *Phœnix Ins. Co. v. Lovenz*, 29 N. E. Rep. 604; *Bills v. Hibernia Ins. Co.* 87 Tex. 547; *Caplis v. Am. F. Ins. Co.* 60 Minn. 376.

NEWMAN, J. The bill of exceptions is not certified to contain all the evidence. So there can be no review of the testimony given upon the trial. The special verdict is deemed to be absolute verity.

The issues made by the pleading were three: (1) Whether proofs of loss had been furnished; (2) whether the plaintiff

had been guilty of fraud and false swearing relating to his loss; and (3) whether the insured property was incumbered. Questions covering each of these issues were submitted to the jury, and each was found in favor of the plaintiff. But it appeared incidentally during the trial that among the property destroyed by the fire, and included in plaintiff's claim, was a sewing machine, which the plaintiff held under an executory contract of purchase for the agreed price of $60, on which he had paid $30. The defendant claimed that, the plaintiff's interest in this being other than the sole and unconditional ownership, the whole policy was avoided thereby. The court took the view that this only avoided the policy as to the sewing machine, or, perhaps, that it proved that it was not intended that the policy should cover that machine. The policy did not, in terms, designate any specific articles of property, but described it generally by classes. The policy itself did not designate any particular sewing machine as the one to be protected by its insurance. Doubtless, it was intended to cover any sewing machine at that place of which the plaintiff was the sole and unconditional owner at the time of the loss, and no other. The effect must be that, if the plaintiff's title to this machine was not the sole and unconditional ownership, this machine was not insured by the policy. It could have no effect as to other property of which the plaintiff did have proper title. The property to be covered by the insurance is indeterminate and not specific. It was intended to cover all the property of the classes named of which the plaintiff should be possessed with proper title, at the place designated, at any time during the life of the policy. If some articles of the classes named, which were in plaintiff's possession, should not be his property, it simply was not intended to insure such. That could not affect the contract as to other property in his possession of which he had proper title. The contract, in this sense and to this extent, is certainly divisi-

ble, and was intended to be so. The action of the court, in requiring the remission from the verdict of the value of the machine, removed all ground for complaint in that regard by the defendant. Whether the plaintiff should have recovered for this item is not involved in this appeal. Certainly, there are many cases cited in the plaintiff's brief which seem to support that contention; and there are some such cases in this court. *Johannes v. Standard Fire Office*, 70 Wis. 196; *Carey v. Liverpool & L. & G. Ins. Co.* 92 Wis. 538. This is the defendant's first alleged error.

His second alleged error is that the evidence shows that no proofs of loss were either furnished or waived. The jury seems to have decided this contention against the defendant, and there certainly was evidence to support the verdict. The point seems to be, not that no proofs were furnished, but that the proofs furnished were insufficient. And it is claimed that further or fuller proofs were waived by the defendant, by the action of the defendant's adjuster in denying all liability of the defendant for the plaintiff's loss. That such denial of liability would, ordinarily, be held a waiver of further or any proofs of loss, seems to be well settled in this state. *Gross v. Milwaukee M. Ins. Co.* 92 Wis. 656, and cases cited. But it is said that it was agreed between the plaintiff and the adjuster that nothing which the adjuster might do or say should be construed as a waiver of any of the defendant's rights. It is said that whether there was a waiver is a question of intention, and should be submitted to the jury. Ordinarily, when the act which constitutes a waiver is intentionally done, and is unequivocal in significance, it is, as matter of law, a waiver, irrespective of the intention of the parties. *Rasmusen v. N. Y. L. Ins. Co.* 91 Wis. 81; *Schultz v. Caledonian Ins. Co.* 94 Wis. 42; May, Ins. (3d ed.), § 508. The adjuster, in effect, gave the plaintiff unequivocal notification that, whatever the circumstances of the loss, the company declined to pay, on the ground that

the policy had never been in force, by reason of the existence of the mortgage. It was unequivocal notice that further proofs of loss would be useless. Parties are not required to do useless things; and the omission to do them does not prejudice rights. A waiver was shown by the undisputed testimony. It did not need to be found by the jury. *Stringham v. Cook*, 75 Wis. 589; *Murphey v. Weil*, 89 Wis. 146.

The defendant also claims error in that the jury was permitted to find a general verdict, in connection with the special verdict, against its objection. This court has held that it is not prejudicial, and so not error, to take a general verdict in connection with a special verdict, in a case where the special verdict disposes of all the controverted issues, so that it does not become necessary to resort to the general verdict in order to help out the special one. *Ault v. Wheeler & W. Mfg. Co.* 54 Wis. 300; *Hoppe v. C., M. & St. P. R. Co.* 61 Wis. 357. In such case the general verdict is merely a correct conclusion of law from the special findings, and neither benefits nor harms either party. In the instant case the special verdict disposed of all the controverted issues and could not be aided by the general verdict.

No reversible error is found in the record.

By the Court.—The judgment of the circuit court is affirmed.

PALMER and another, Respondents, vs. TOMS and another, Appellants.

96	367
110	[1]449

May 6 — May 21, 1897.

Contracts: Restraint of trade: Nature of vendee's interest.

1. An agreement by the vendors of a livery and funeral business not to engage in similar business in the same city for five years, and to pay ten dollars per day as stipulated damages for each day's violation thereof, is valid.

2. The interest of the purchasers of a business in an agreement by the vendor not to engage in a similar business for a limited time ceases when they dispose of the business, and they cannot recover for a subsequent breach.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Affirmed.*

Plaintiffs owned an old established livery and funeral business, so called, in the city of La Crosse, Wisconsin. They sold such business to the defendants, with the good will thereof and all personal property used therewith, for the sum of $13,000, and leased to defendants, for use in such business, the barn and premises where the same had been theretofore carried on. As an inducement to defendants to make the purchase at said sum of $13,000, plaintiffs agreed in writing that neither of them would engage in the same kind of business in the city of La Crosse for the term of five years, and that, in case of a breach of such agreement on the part of either of them, they would, for each day such breach continued, pay to the defendants the sum of $10. Some time after the transaction referred to, defendants, with others, formed a corporation, called the "City Livery Company," to conduct the business purchased by defendants as aforesaid, and to such company said business and the property purchased therewith were transferred, but without the contract in restraint of plaintiffs' engaging in the business being specially mentioned. Subsequently, *John V. Palmer*, in violation of the aforesaid contract, again entered into a livery and funeral business in the city of La Crosse, and thereafter, upon default being made by defendants and their grantee (the said livery company) in the payment of the rent due on the barn leased as aforesaid, brought suit therefor against defendants, and they counterclaimed for damages for the aforesaid breach of contract. On the trial no question was raised as to the amount of rent due upon the lease. Proof was made on the part of defendants of the allegations of the

counterclaim, in accordance with the aforesaid statement. The trial court held that defendants were not entitled to recover on such counterclaim, and directed judgment for plaintiffs for the rent due. Judgment was thereupon entered in plaintiffs' favor, from which this appeal was taken.

C. L. Hood, for the appellants.

For the respondents there was a brief by *Higbee & Bunge*, and oral argument by *E. C. Higbee*.

MARSHALL, J. The general rule that contracts in restraint of trade are void has its exceptions, one of which is that, for the protection of the good will of an established business, the owner of the same may make a sale thereof with such business, and, as an inducement to the purchaser to buy, part with his liberty to engage in the same business for such limited time and within such limited territory as may be reasonably necessary to protect the purchaser in the enjoyment of such business. With the limitations indicated, the public is not necessarily deprived of the vendor's industry. Such vendor is but partially prevented from pursuing his occupation. He receives a valuable consideration for the restraint upon his own liberty; and the vendor becomes possessed of substantial benefits by the transaction, without material injury, if any, to the public. Hence the objections are obviated which generally render contracts in restraint of trade void, and they are sustained by universal authority. *Laubenheimer v. Mann*, 17 Wis. 542; *Fairbank v. Leary*, 40 Wis. 637; *Berlin Machine Works v. Perry*, 71 Wis. 495; *Washburn v. Dosch*, 68 Wis. 436; *Richards v. Am. D. & S. Co.* 87 Wis. 503; *Williams v. Farrand*, 88 Mich. 473; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64; *Johnson v. Gwinn*, 100 Ind. 466; 3 Am. & Eng. Ency. of Law, 882, and notes. The essential element of reasonableness requires that the vendor shall not part with his liberty of action to any greater extent than is reasonable, having regard

to the circumstances of the given case. The question in that regard, when the validity of the contract is judicially called in question, is one of law for the court. *Richards v. Am. D. & S. Co., supra.* In *Washburn v. Dosch, supra*, the property sold consisted of the goods and good will of a mercantile business. The vendor agreed not to engage in the same business, in the particular village in which such business was located, for five years. This court sustained the contract. In *Johnson v. Gwinn, supra*, the property sold consisted of the stock and personal property used in a livery business. There was an agreement not to engage in the same business, in the village where such business was located, for the term of five years, and that, if default was made, the vendor should pay to the vendee $2,500 as liquidated damages. The court held the contract valid. In the instant case, the agreement made by respondents, not to engage in the business sold, for a period of five years, and, for failure to keep the agreement, to pay $10 per day, as stipulated damages for each day's violation thereof, appears to be unassailable, within the authorities cited and the well-established principles governing the subject. All the requirements of a binding contract in restraint of the vendors' liberty of action are present: The restraint was partial, it was supported by a valuable consideration, and was reasonable, in the light of all the attending circumstances.

The only other question that need be considered is whether, after the sale by appellants of the business and good will to the corporation, any beneficial interest in the agreement in restraint of respondents' liberty to engage in such business still remained with appellants, so they could enforce it in case of a breach. The theory of appellants' counsel is that the beneficial interest in the contract attached to them as a personal matter, and remained with them to protect their vendees, or, if not, that it did not pass to such vendees, because not specially mentioned as a part of, or in con-

nection with, the property sold. To determine the question thus presented, the nature of the contract must be understood. It does not constitute a distinct property right, independent of the business it was designed to protect, any more than the good will itself. The purpose of the contract being to protect the property or business to which it related, it was an incident of, and adhered to, such property and business. It could not otherwise exist. That is the theory upon which the courts have sustained such contracts. In discussing this subject in *Gompers v. Rochester*, 56 Pa. St. 194, where the precise contention was made as here insisted upon by appellants, it was said by THOMPSON, C. J., that "the fallacy of the position of the plaintiffs in error seems to consist in regarding the covenant as attaching or incident to them personally; whereas it was alone an incident to the property which they had parted with, and the business also. It would not have been binding for want of a consideration, unless as incident to the property. . . . I doubt if any case can be found in which such a covenant has been enforced where it had no effect to protect the business or trade of the covenantee. Indeed, it would be against public policy and every principle upon which such contracts are sustained." The facts of the case there under consideration were that the person with whom the contract was made had sold the property such contract was designed to protect, to another; and, some time after such sale, such person brought suit against his vendor for a breach of the contract. The court held that, if a breach existed, the right of action was in favor of the second vendee; that it passed to him by the sale of the business, and as an incident thereto; that, after such sale, the first vendee could not be injured by a breach of the contract, for all interest in it had passed from him by the transfer of the property to which it inseparably adhered, so that, if a breach existed at all, the cause of action accrued in favor of the second vendee.

To the same effect are Allen, Good Will, 28; *Bird v. Lake*, 1 Hem. & M. 338; *Benwell v. Inns*, 24 Beav. 307; *Hedge v. Lowe*, 47 Iowa, 137; *Davies v. Davies*, 58 Law T. R. (N. S.), 209; *Jacoby v. Whitmore*, 49 Law T. R. (N. S.), 335. The same principle was applied in *Listman Mill Co. v. William Listman Milling Co.* 88 Wis. 334, where the question involved was whether a trade-mark which had been adopted and used for a long time as the designation of the product of a particular manufactory, passed as an incident or adherent of the business by a sale of the property. It was held that, the use of the trade-mark being to protect the particular industry, it passed, as an incident of it, by a sale and transfer of the business.

Without further discussion, it is manifest from what has preceded that at the time of the commencement of this action the defendants had no interest in the contract under consideration, because they had theretofore ceased to be the owners of the livery business to which it related. Therefore the decision of the trial court, directing a verdict in plaintiffs' favor, was right, and the judgment appealed from must be affirmed.

By the Court.— So ordered.

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96 372
106 542

BAIER, Plaintiff in error, vs. SCHERMERHORN, Defendant in error.

May 6 — May 21, 1897.

(1) *Writ of error: Adequate remedy by appeal.* (2) *Obstruction of highway: Special injury to individual.*

1. The mere fact that an aggrieved party has been given an adequate remedy by appeal to the supreme court does not deprive him of the right to have the proceedings reviewed by that court on writ of error, under sec. 21, art. I, Const.

2. A private individual does not receive such special injury from the unlawful obstruction of a highway, merely because he does not have any other practicable route by which he can reach his land, as will entitle him to recover therefor from the person responsible for the obstruction.

ERROR to review a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

The facts are stated in the opinion.

For the plaintiff in error there was a brief by *Bleekman, Bloomingdale & Bergh*, and oral argument by *F. H. Bloomingdale.*

C. L. Hood, for the defendant in error.

CASSODAY, C. J. This action was originally commenced in justice's court by *Schermerhorn* for the unlawful obstruction of the public highway described, by *Baier*, December 5, 1894, whereby he was obliged to turn back with his team, to his damage. *Baier* answered by way of a general denial, and further specifically denied that the *locus in quo* ever was a public highway or any highway whatever, and alleged that at the time mentioned he was the owner and lawfully in possession of said lands and premises, and that at the time mentioned *Schermerhorn* was wrongfully and unlawfully trespassing upon his premises. Upon such plea of title the cause was, under the statute, duly certified to the circuit court, where it was tried, and at the close of the trial the jury returned a special verdict to the effect that the road in question had been used and worked as a public highway through and across the land of *Baier* continuously for the period of ten years immediately prior to December 5, 1894, and was laid out by the supervisors, and the order laying out the same was recorded November 5, 1860; that that part of the road at the gate in question was thereafter opened and worked for the term of three years; that the road at the gate in question was opened, traveled, or worked within four

years after it was so laid out by the supervisors; that after that period it was worked and opened up to the present time; that the highway in question across the premises of *Baier* was not entirely abandoned as a route of public travel, and no highway tax expended thereon, during a period of five years, at any time since it was so laid out, and prior to December 5, 1894; that *Schermerhorn* did not have a practicable route, by which he could reach his land in question, otherwise than by going through or across the land of *Baier;* that *Schermerhorn* sustained special damage in December, 1894, different in character from that sustained by the public in general, by reason of the maintaining of the gate in front of *Baier's* house, and assessed such damage at $1; and that they found for *Schermerhorn.* Thereupon judgment was entered upon such special verdict in favor of *Schermerhorn* accordingly, to reverse which *Baier* sues out this writ of error.

We cannot dismiss this writ of error merely because *Baier* had another remedy, by appeal and certificate of the trial judge, under ch. 215, Laws of 1895. Counsel gives no other reason. The two remedies are distinct from each other. *Bumbalek v. Peehl,* 95 Wis. 127. As there indicated, unless the common law or some statute at the time of the adoption of the constitution precluded such writ in a case like this, the aggrieved party is entitled to the writ as a matter of right. *Id.* Const. art. I, sec. 21. Counsel has cited no authority to that effect, and, with the limited time at our command, we have found none that is satisfactory.

The particular acts of *Baier,* complained of, consisted in maintaining a fence, with a gate in it, across the alleged highway, on his own land, and also in placing a log in such highway, on his own land, near the same place. If there was in fact a public highway where such obstructions were located, then *Schermerhorn,* or any other traveler upon such highway, had the legal right to abate or remove the same in

order that he might proceed as such traveler. But such right of abatement or removal did not necessarily give a right of action against *Baier* for so placing or maintaining such obstructions. There is no pretense that any injury was inflicted upon *Schermerhorn* personally, or upon his property or rights of property, by reason of such obstructions. "Mere delay in a journey, or being turned aside and compelled to take a circuitous route, or mere loss of a journey, by reason of an obstruction, unattended by any special damage, is not sufficient to support an action, because it is a part of the common injury, and similar to that borne by all who attempt to pass." 2 Wood, Nuisances (3d ed.), § 701; *Burrows v. Pixley*, 1 Am. Dec. 56, and note; *State v. Hunter*, 44 Am. Dec. 41; *Low v. Knowlton*, 45 Am. Dec. 100.

The rule stated is in strict harmony with the repeated rulings of this court. *Zettel v. West Bend*, 79 Wis. 316; *Evans v. C., St. P., M. & O. R. Co.* 86 Wis. 603; *Mahler v. Brumder*, 92 Wis. 483. In the first of these cases it was held that "to sustain a private action for injuries caused by a public nuisance, the injuries done to the plaintiff must be different, not merely in degree, but also in kind, from those done to the public." True, there is a finding of the jury to the effect that *Schermerhorn* sustained special damage, "differing in character from that sustained by the public in general, by reason of the" maintenance of the gate. But it is manifest from the undisputed evidence that such special damage so found is too remote to be the foundation of an action. It is like the Ohio case [*Farrelly v. Cincinnati*, 2 Disney, 516] mentioned in *Zettel v. West Bend*, wherein it was held that: "A traveler who is forced to abandon his nearest route by reason of the nonrepair of the street, and seeks his destination by a longer and more circuitous road, whereby he suffers injury in his business, does not sustain such a special damage as to entitle him to an action against the party charged with the duty of keeping the way in repair. So, also, in case of an omnibus line which has

lost custom by reason of being unable to pursue its customary route, in consequence of the founderous condition of a street. In these cases the damages are not the immediate consequence of the wrong, but are remote."

It is undisputed that the fence, with the gate in question, had been maintained from twelve to twenty years. Such maintenance during that time was a continued assertion that the roadway mentioned was not a public highway, but at most a private way. If it was desirable that the same should be maintained as a public highway, then it was the duty of the public officials to keep the same free from such obstructions; but it was not for *Schermerhorn*, as a private individual, to vicariously assume the performance of such duty.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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96 376
s101 159

DICKINSON, Appellant, vs. NORWEGIAN PLOW COMPANY, Respondent.

May 6—May 21, 1897.

Master and servant: Implied contract: Court and jury.

In an action for wages, evidence that plaintiff had been employed by defendant "at a salary of $1,500 per annum, to begin June 1, 1889," and that he began work on that date, and continued uninterruptedly in defendant's employ until June 1, 1895, without any new contract, is *held* sufficient to require the submission to the jury of the question whether plaintiff was employed for the entire year ending June 1, 1895, at the rate of $1,500 per annum, although during that year defendant notified him that his salary had been reduced.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

The facts are stated in the opinion.

For the appellant there was a brief by *McConnell & Schweizer*, and oral argument by *C. H. Schweizer*.

For the respondent there was a brief by *Fruit & Brindley*, and oral argument by *J. J. Fruit*.

WINSLOW, J. This was an action to recover a balance of $200 claimed by plaintiff to be due him for services during the year ending June 1, 1895. The evidence of plaintiff showed that he was first employed by the defendant by correspondence in May, 1889, "at a salary of $1,500 per annum, to begin June 1st, 1889," and that he began work June 1, 1889, and continued uninterruptedly in defendant's employ until June 1, 1895, without any new contract, being paid at the rate of $1,500 per year up to the 1st day of October, 1894. In November, 1894, the secretary and treasurer of the defendant told the plaintiff that his salary had been reduced by the directors to $1,200 per annum. The plaintiff denied their right under his contract to reduce his salary. He continued to work until June 1st following, but the defendant only paid him $100 per month for the balance of the year from October 1, 1894, and this action is to recover the $200 additional which would be due at the rate of $1,500 per year for the time between October 1, 1894, and June 1, 1895. The plaintiff was nonsuited on the ground that the evidence was insufficient to show a hiring for the last year at $1,500.

We think this was error. This court has very recently held, in a very similar case, that where a man is employed by another for a year, and continues in the employment into the next year without any new hiring, a finding of an implied contract for the second year at the same rate is warranted; further, that, where the evidence showed that one worked for another for several years at a salary fixed at a certain sum per annum, a finding that the implied contract was for a whole year's service at the same rate at the be-

ginning of each new year was sustained by the evidence. *Kellogg v. Citizens' Ins. Co.* 94 Wis. 554. To the same effect are *Down v. Pinto*, 9 Exch. 327; *Horn v. Western Land Asso.* 22 Minn. 233; *Bascom v. Shillito*, 37 Ohio St. 431; *Franklin Mining Co. v. Harris*, 24 Mich. 115. There was therefore sufficient evidence to go to the jury upon the question whether or not the plaintiff was employed for the entire year ending June 1, 1895, at the rate of $1,500 per annum.

By the Court.— Judgment reversed, and action remanded for a new trial.

TOPPING, Appellant, vs. PARISH, Administrator, and another, Respondents.

96 378
102 411
96 378
108 501
96 378
52 LRA 514

May 6 — May 21, 1897.

(1) *Pleading: Legal or equitable cause of action?* (2) *Vendor and purchaser of land: Partial failure to perform: Rescission.* (3) *Recording acts: Lease:* Bona fide *purchaser.*

1. The intention of a pleader in setting up facts pertinent to a claim for equitable relief by rescission of the sale and conveyance of certain land, but not material to a legal action for the recovery of a mere money judgment, is *held* to have been to state an equitable cause of action, even though the prayer for relief demanded judgment for an amount equal to the consideration paid for the conveyance as well as for the rescission.
2. Where a contract for the sale of land has been so far executed that a valid title to the land has been conveyed to the vendee, breach of a covenant in the deed to deliver possession of the premises on a specified day and the insolvency of one of the grantors are insufficient to warrant a rescission.
3. A lease of land for one year is not a conveyance within the meaning of sec. 2242, R. S., nor is the lessee a purchaser in good faith as against a prior conveyance by the lessor.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This action was brought to rescind the sale and conveyance of a farm made by John Sipes, in his lifetime, and *Martha J. Sipes*, July 19, 1894, to the plaintiff, for $2,200. Of this sum, $1,788 was secured by two notes and a mortgage on the same premises, and the remaining sum of $412 was paid by a transfer to the vendors of a note and mortgage against other parties and premises, upon which that sum was actually due. The vendors at the time conveyed the premises sold to the plaintiff by warranty deed, inserting therein an agreement that they would deliver possession of said premises to the plaintiff on the 1st day of April, 1895, and it was alleged that they had failed and neglected, and still refused, to do so; that, at the time of the delivery of the deed, one Alvina Decker was seised of said premises, lawfully claiming the same by virtue of a lease from the vendors, and that after the delivery of the deed to the plaintiff the said vendors renewed said lease, or rented or leased said premises again to the said Alvina Decker, for the period of one year; and that she was then in possession thereof under said lease, and refused to deliver said premises to the plaintiff. On the 1st of April, 1895, the plaintiff, by her agent, went to the defendant *Martha J. Sipes* for the purpose of demanding the return of said notes and mortgages, but she refused to return the same, although she had possession thereof, or to do anything about it. The defendant John Sipes died on the 4th of April, 1895, and *David Parish*, appointed his administrator, had qualified and was acting as such. It was further alleged that the defendant *Martha J. Sipes* was insolvent, and that a judgment against her would not be collectible in proceedings at law; that she threatens to dispose of and sell said notes and mortgages, and that she would do so unless enjoined by the court; that the plaintiff had not conveyed or incumbered said premises, but had been willing and ready at all times, and still was, to reconvey said premises to the said John Sipes, or to said

David Parish, as such administrator, or to such person as the court might determine, for the benefit of the estate of John Sipes, deceased. Judgment was demanded against the defendants for $2,200, with interest from July 19, 1894, or that the said defendant *Martha J. Sipes* be compelled, by an order or judgment of the court, to deliver to the plaintiff said notes and mortgages given for the purchase of said land, and that the defendants, their and each of their agents, etc., be enjoined until the further order of the court from selling, disposing of, concealing, or transferring or removing said notes and mortgages out of the jurisdiction of the court, and for such other judgment, order, or relief as to the court might seem just and equitable.

A temporary injunction was granted as prayed for. The defendants having answered the complaint, the cause came on for trial, when the counsel for the defendants objected, for each defendant separately, to the introduction of any evidence under the complaint, for the reason that the same did not state facts sufficient to constitute a cause of action, and that the court was without jurisdiction. The court sustained the demurrer, and adjudged that the complaint be dismissed, with costs, from which judgment the plaintiff appealed.

The cause was submitted for the appellant on the brief of *Churchill & Sanborn*, attorneys, and *G. W. Cate*, of counsel, and for the respondents on that of *S. A. Connell*, attorney, and *E. J. Goodrick*, of counsel.

PINNEY, J. It may be inferred, perhaps, from the facts above stated and contained in the complaint, although not expressly so alleged, that the deed to the plaintiff contained a covenant that the grantors were lawfully seised in fee at the time of its delivery. It is alleged that the deed was a warranty deed, and there is no claim that a valid title to the lands did not pass by it to the plaintiff. The stipulation or

covenant for the delivery of possession of the premises to the plaintiff on the 1st of April, 1895, was executory; and it seems that, the lease to Alvina Decker having expired, the plaintiff's grantors, after the execution and delivery of their deed to the plaintiff, renewed said lease, or rented and leased said premises again to her, for the term of one year, and at or before the time fixed for the delivery of the premises to the plaintiff. We think that, in view of the facts stated and the relief prayed, the complaint must be regarded as an attempt to set forth an equitable cause of action for rescission, although judgment was demanded for $2,200 and interest as well as for the equitable relief specially prayed for. The two kinds of relief are absolutely inconsistent, and the plaintiff was bound to elect either to abide by the covenant in the deed, or to claim a rescission *in toto*. The circuit judge properly held, we think, that the action intended was an equitable one for rescission. The complaint states facts not material to a legal action for the recovery of a mere money judgment, but which are pertinent to a claim for equitable relief; and she prays for such, by rescission of the sale and conveyance of the premises and the cancellation and delivery up of securities. The nature of the action must be determined by the prayer for relief. *Gillett v. Treganza*, 13 Wis. 472.

There is no question as to the validity of the title conveyed to the plaintiff, and the mere failure of the grantors to deliver possession of the premises at the time specified in the deed would not, of itself, justify the plaintiff in suing for rescission. The contract had been wholly executed on her part, and she had received a valid title and taken a covenant of the vendors that they would deliver possession of the premises conveyed on the day specified, and their failure to perform was partial only. The general rule is that, to justify a rescission, the failure of the opposite party to perform must be total, so that the object of the contract

shall have been defeated or rendered unobtainable by reason of the misconduct or default of the other party. 2 Warvelle, Vendors, 850. "For partial dereliction and non-compliance in matters not necessarily of the first importance to the object of the contract, the party must seek his remedy upon the stipulations of the contract itself." *Weintz v. Hafner*, 78 Ill. 27; *Selby v. Hutchinson*, 9 Ill. 319. In the case of *Board of Sup'rs of Douglas Co. v. Walbridge*, 38 Wis. 191, it was said: "The application to a court of equity for the rescission, cancellation, or delivering up of agreements and securities is not founded upon an absolute right, but is rather an appeal to the sound discretion of the court, which, in granting or refusing the relief prayed, acts upon its own notions of what is reasonable and just under all the surrounding circumstances. While we are to understand that the interference of equity in these cases is a matter of mere discretion, this is not an arbitrary and capricious, but a sound and reasonable, discretion, *secundum arbitrium boni judicis.* 1 Story, Eq. Jur. (12th ed.), § 693; Willard, Eq. Jur. (1st ed.), ch. 4, § 3." It is not alleged that there was any fraud or misrepresentation, and it does not appear but that the plaintiff has a complete and adequate remedy at law for damages on the covenant in the deed, for failure to deliver possession at the stipulated time. It is not averred that both of the grantors in the deed were insolvent. Had the plaintiff sued on the covenant, her damages would have been the value of the use of the premises for the time she had been deprived of such use. *Fritz v. Pusey*, 31 Minn. 368.

It appears that the lease to Alvina Decker, under which she held the premises against the plaintiff, was made or renewed after the vendors had conveyed their title to the plaintiff, and when they had no power or capacity to grant such lease. She could not be considered as a purchaser under it, without notice. It was not a conveyance, within sec. 2242, R. S., and she could not acquire any better right.

to hold the premises against the plaintiff than the vendors had; and manifestly they had no right to hold, as against their own deed and the covenant to deliver possession to the plaintiff.

The complaint did not, we think, state facts sufficient to constitute the cause of action relied on.

By the Court.— The judgment of the circuit court is affirmed.

WILBUR LUMBER COMPANY, Appellant, vs. OBERBECK BROTHERS MANUFACTURING COMPANY, Respondent.

May 6 — May 21, 1897.

Contracts: Construction: Failure to grade and ship lumber as directed: Measure of damages.

A contract of sale of certain lumber, after specifying the quantities and prices, provided that "this lumber . . . can be graded to suit purchaser; the above prices are for what we call log run, worthless culls out." It was also understood that the vendor was to ship the elm lumber to such purchasers as the vendee might find for it. In an action to recover a balance due thereunder it appeared that the defendant had ordered all the elm lumber "of the grade of common or better," to be shipped to Chicago, and the remainder to Centralia, and that the culls were worth less in Chicago than in Centralia. *Held*, that the defendant was entitled to recover as damages, by way of partial defense or counterclaim, the difference between the value, at Chicago, of culls which had been shipped there and their value at Centralia, and the difference in freight between the two points, together with the invoice price of worthless culls which had been shipped to Chicago mingled with the better grades of lumber, and the freight on the same.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

The action is to recover a balance for lumber sold and delivered to the defendant on board cars at Wausau, Wiscon-

sin. The plaintiff was a corporation, dealing in lumber at Wausau. The defendant was a manufacturing corporation, doing business at Centralia, Wisconsin. The contract by which the lumber was sold is evidenced by the following letter:

"Grand Rapids, Wis., Sept. 27, 1894.

"Oberbeck Bros. Manuf'g Co., Centralia, Wis.—Gentlemen: Replying to yours of the 26th, will say, we quote you f. o. b. Wausau, on the following hardwood, log run:

16,500 ft. inch birch	$12.00	90 days from Nov. 16, '94.
5,500 ft. 1¼-in. birch	12.00	
15,000 ft. inch ash	10.00	
13,000 ft. inch red oak	14.00	
2,000 ft. in. butternut	10.00	
40,000 ft. 2-in. soft elm	8.00	4 mos. from Nov. 16, '94.
50,000 ft. 3-in. soft elm	8.00	

"This lumber is bone dry, well manufactured, well covered, and can be graded to suit purchaser. The above prices are for what we call log run, worthless culls out. Hoping you will be able to use the stock at these prices, I am,

"Yours truly, F. L. Tibbits, P. A."

The controversy is over the elm lumber. It was known and understood between the parties that this lumber was not to be used by the defendant in its business at Centralia, but was to be shipped to such purchasers as the defendant might find for it. A quantity of it was shipped by the plaintiff to Chicago, to parties there, on defendant's order, which was to ship all the elm lumber covered by the contract "of the grade of common or better." The order was accompanied by a direction not to ship to Chicago any lumber—"not a board"—of doubtful grade, but to ship all except the common or better to the defendant at Centralia. The defendant claimed that the plaintiff, under this direction, shipped a large quantity of what is called culls and worthless culls, which were of little value in the Chicago market,—less than at Centralia; that it lost by such ship-

ment a large part of the value of the culls, and the difference in the cost of the freight over and above what the cost of the freight would have been simply to Centralia and the whole freight on the worthless culls. It claims also that the amount of worthless culls so shipped should be deducted from the whole amount of lumber with which it is charged, as the worthless culls were not included in the contract of sale, and were not accepted at Chicago by the defendant. These facts were set up in the answer for a counterclaim. The plaintiff claimed $714.72, and had a verdict for $497.42. From judgment on the verdict it appeals.

The cause was submitted for the appellant on the brief of *Williams & Conway*, and for the respondent on that of *B. R. Goggins.*

NEWMAN, J. The answer seems to have stated sufficiently a partial defense to the action, and a counterclaim. It was sufficient as against a demurrer *ore tenus.* There was testimony which tended to prove both the defense and the counterclaim. So, it could not be error to refuse the motion to direct a verdict for the plaintiff for its whole claim. These are the errors claimed, aside from rulings on the admission of testimony and exceptions to the charge of the court.

By the contract, the plaintiff was to ship the lumber as ordered by the defendant. It was contemplated that some of it, at least, was to be shipped to defendant's customers. It was to be graded to suit customers. It was to be loaded by the plaintiff, into the cars, and shipped in accordance with defendant's orders. By its order, nothing but common or better was to be shipped to Chicago. The only grading required was to select out the commons and better, and to leave the culls. The worthless culls had not been bought by the defendant, and should not have been shipped at all. Manifestly, if culls were shipped to Chicago, where they were of less value than at Centralia, the defendant would be

damaged. The measure of such damages would be the difference between the value at Chicago and the value at Centralia, with the difference in freight between the two points. If worthless culls were shipped to Chicago, the defendant was damaged the whole amount of freight which it necessarily paid on them. The culls and worthless culls were shipped intermixed with common and better; so that the defendant necessarily paid the freight on all, in order to get its own. And so much of plaintiff's claim as was for such worthless culls was in excess of plaintiff's right, and should be deducted from its claim; for the worthless culls were not included in the sale, and were not accepted by the defendant at Chicago. These were the matters which were submitted to the jury.

Other matters were controverted on the trial, and many of the alleged errors relate to such other matters, which were eliminated from the case in its submission to the jury. Of this the plaintiff has no reason for complaint. It was submitted in a charge which seems to be clear, fair, and free from errors, at least so far as these issues are concerned. There were many exceptions to rulings on questions of the admission of testimony, and to parts of the charge of the court. They have little relation to the matters submitted, and, if erroneous, did not prejudice the plaintiff.

By the Court.—The judgment of the circuit court is affirmed.

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MONSON, Respondent, vs. LATHROP, imp., Appellant.

May 6 — May 21, 1897.

Libel: Parties: Publication: Telegram.

1. A telegram, sent to a clergyman two days after a general election, stating that "the citizens of Wisconsin demonstrated you are an unscrupulous liar," is libelous *per se*.

2. Where a libelous publication is the joint act of two or more persons, they may be sued either jointly or severally at the election of the plaintiff.
3. The writing of a libelous telegram and its delivery to the company for transmission constitute a publication.

APPEAL from an order of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

The facts are stated in the opinion.

For the appellant there was a brief by *John F. Cole*, attorney, and *Quarles, Spence & Quarles*, of counsel, and oral argument by *George Lines.*

For the respondent the cause was submitted on the brief of *Cate, Sanborn, Lamoreux & Park.*

CASSODAY, C. J. The amended complaint alleged, in effect, that at the times mentioned the plaintiff was a minister of the gospel and a member of the Lutheran church, and in charge as rector of the Lutheran Church Society at Amherst, Wisconsin. That November 5, 1894, there was a general election in Wisconsin. That November 7, 1894, the defendant *Lathrop* wilfully and maliciously composed, wrote, and transmitted to the plaintiff by telegraph over the lines of the defendant the Western Union Telegraph Company, a foreign corporation doing business in this state, the false, libelous, and defamatory matter concerning the plaintiff following, with the innuendoes omitted, to wit: "Night message. The Western Union Telegraph Co. Dated Marshfield, Wis., 11-7-1894. *To Rev. I. G. Munson:* The citizens of Wisconsin demonstrated you are an unscrupulous liar. A MARSHFIELD DEMOCRAT." That said *Lathrop* then and there wilfully and maliciously delivered the said false, libelous, and defamatory matter, so composed and written, to the agent of the defendant company then and there in charge of its office at Marshfield, and duly authorized to receive and transmit the same, and then and there instructed the

said agent to transmit the message by telegraph to the plaintiff at Amherst; and thereupon the company wilfully and maliciously transmitted the same to the plaintiff at Amherst, and delivered the same to him in writing at Amherst. That the agents and servants of the company at Marshfield and Amherst saw, read, and wrote the said message, and that, in the manner set forth, the defendants wilfully and maliciously published of and concerning the plaintiff the false, libelous, and defamatory matter aforesaid, to his damage. To such complaint the defendant *Lathrop* separately demurred upon the ground that it appeared upon the face thereof that the same did not state facts sufficient to constitute a cause of action against him. From the order overruling such demurrer, the defendant *Lathrop* brings this appeal.

We are constrained to hold that the message was libelous *per se*. *Cranden v. Walden*, 3 Lev. 17; *Australian Newspaper Co. v. Bennett* [1894], App. Cas. 284; *Hake v. Brames*, 95 Ind. 161; *Bradley v. Cramer*, 59 Wis. 311, and cases there cited.

It is contended that the complaint seeks to charge the two defendants jointly with the publication of the libel, and that it is insufficient for that purpose, and hence that the demurrer should have been sustained. Certainly there are authorities holding that a telegraph company may be held liable for sending libelous messages. *Whitfield v. S. E. R. Co.* 96 Eng. C. L. 113; *Peterson v. W. U. Tel. Co.* 65 Minn. 18. However this may be, it is well settled that the publication of a libel may be the joint act of two or more persons, who may, in such a case, be sued either jointly or separately, at the election of the plaintiff. But for two distinct publications of the same libel, one by A. separately, the other by B., two actions must be brought, one for each publication. But the plaintiff is not obliged to join as a defendant every person who is liable. He may sue only one or two, and the

liability of the others will be no defense for those sued, or mitigate the damages recoverable. Newell, Defamation, S. & L. 382, § 42; Odgers, Slander & L. 440, 441. The demurrer raises no objection to the complaint on the ground of a defect of parties defendant, nor upon the ground that several causes of action are improperly united, and hence, under the statute, any such objection must be deemed to have been waived. R. S. sec. 2654. It is therefore immaterial, under the authorities cited, whether the complaint charges both defendants with jointly publishing the libel. The real question is whether it states a cause of action against the defendant *Lathrop.*

The writing of the message, and the delivery of it by him to the company for transmission, as mentioned, was a publication of the same. *Wilson v. Noonan*, 27 Wis. 598; *Muetze v. Tuteur*, 77 Wis. 236; *Loibl v. Breidenbach*, 78 Wis. 49. In the first of these cases it was held that "one who writes an article in English, and employs another person as his agent to translate it into German and publish it, will be liable if the German article so published is libelous, although the translation is inaccurate." In the last of these cases it was held that "one who negligently signs a libelous article without knowing its contents, and delivers it to the person who wrote it without any direction restricting the use to be made of it, is responsible for the publication thereof by the person to whom it is so delivered, where the article shows on its face that it is intended for publication." See, also, *Bacon v. M. C. R. Co.* 55 Mich. 224; *Peterson v. W. U. Tel. Co.* 65 Minn. 18.

It follows that the demurrer was properly overruled.

By the Court.— The order of the circuit court is affirmed.

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Fox, Respondent, vs. Masons' Fraternal Accident Association of America, Appellant.

May 6 — May 21, 1897.

Accident insurance: Agreement to arbitrate, when void: Public policy: Occupation: "Lumberman in woods:" Special verdict: Instructions: Construction of policy: Particular exposure: Self-executing change of classification.

1. A provision in a mutual accident insurance policy requiring all questions between the association and the assured to be, at its option, settled by arbitration, thereby ousting the courts of jurisdiction over every part of the subject of liability and the amount thereof as well, is void as against public policy.
2. The fact that at the time of his injury the insured was superintending a small portable sawmill temporarily located in the woods for the purpose of cutting logs into lumber for use in a planing mill owned by him, does not, as matter of law, make his occupation other than that of a "mill owner, overseeing only," or place him in the classification including the more hazardous occupation of a "lumberman in the woods."
3. Where several questions were submitted to the jury for special verdict in an action on an accident insurance policy, each seeking to determine by an affirmative or negative answer whether the assured at the time of the accident was engaged in a separate and distinct occupation, it was not error to instruct the jury that if they answered any one of the questions in the affirmative they must necessarily answer the others in the negative.
4. Where an accident insurance policy provided that "if the assured is injured in any occupation or exposure classified by the association as more hazardous than that here given, his insurance and weekly indemnity shall only be so much as the premiums paid by him will purchase at the rates fixed for such increased hazard," and the scheme of insurance classified occupations and not acts and exposures, a particular exposure, though not in pursuit of and as a part of the business or occupation mentioned in the certificate, is not material to affect the liability of the insurer.
5. Under a contract of accident insurance locating the policy holder in a particular class and specifying as nearly as practicable his actual occupation, a provision that, in case of change of occupation to one more hazardous than that named, the insured should be

entitled to recover only such an amount as the premium paid by him would purchase at the rates fixed for the increased hazard, is self-executing, no change in the certificate itself being necessary to effect a reduction of the amount of insurance.

6. Thus, a letter from the insured to the company notifying it of a change of occupation, and the reply of the company that the classification of the insured had been reduced from class 2 to class 3, as effectually modified the contract as if the change had been written into the certificate.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Action to recover for a death indemnity on a certificate of insurance issued by the defendant, a mutual accident assurance association. George H. Fox made his application to the association with knowledge of its method of business and of the manual of classification of risks with reference to which all certificates of indemnity were issued, about the 26th day of November, 1888. He was then a station agent at Mankato, Minnesota. A certificate was duly issued to him upon such application, classifying his occupation as in class 1; death indemnity, $5,000. Such application contained a stipulation to the effect that, in case he should be injured in any occupation or exposure classified by the association as more hazardous than the one stated in such application,— that of station agent,— he should be entitled to recover only such an amount as the premiums paid by him would purchase at the rates fixed for the increased hazard. The certificate contained a similar stipulation. It also contained a stipulation to the effect that all questions respecting the liability of the association should be settled by arbitration, at its option; that no suit should be brought except to enforce payment of the award of the arbitrators, unless the association refused to arbitrate, and that no suit should be brought at all after the expiration of one year from the date of the accident. On the 2d day of June, 1890, the assured notified the association in writing that he had changed his occupation to that of part owner in a sawmill at Big Falls, Minne-

sota; that his duties were general supervision of the business, and that they would require him to be around the mill, lumber yard, office, and store. Thereupon he was notified by the association to send in his certificate with a full statement of his work. Such request was complied with, and thereafter the association changed the certificate by placing the assured in class 2, specifying his occupation as mill owner, overseeing only; death indemnity, $3,000. Thereafter, on the 31st of April, 1892, the assured notified the association of another change in his occupation, and that he had changed his residence to Waupaca, Wisconsin, where he was associated with C. J. Shearer as owner and operator of a planing-mill business, dealing in lumber, lath, sash, doors, etc., turning, scroll sawing, and bracket work, contractors and builders; that his duties would consist of supervising the yard and mill, with a likelihood that he might necessarily, for an hour or two, from time to time, be required to operate some of the machinery. Thereupon he was placed in class 3, as a salesman and general supervisor of lumber mill and yard, not working; death indemnity, $2,000; and a notification of such change was sent to him as follows:

"Westfield, Mass., May 9, 1892.

"Geo. H. Fox, Waupaca, Wis.—Dear Sir and Brother: We are in receipt of your letter of April 10th, and in reply will say that in your present occupation you would be classed as 'salesman and general supervisor in lumber mill and yard, not working; in class three.' Of course, you understand that, although the words 'not working' follow the occupation, if you should be injured while working a machine, you would not be deprived of indemnity, but for such accident you would draw the same as a brother insured for that work all the time. If you desire your certificate changed, you can send it to this office, and we will make the change, and return to you. Trusting this will be satisfactory, I remain, courteously and fraternally, yours,

"Jas. A. Lakin, Secretary."

The certificate remained without change up to the time of the death of the assured. No notice was given to the company of dissatisfaction with the classification stated in the communication to the assured of May 9, 1892.

Some time prior to April 17, 1894, the assured and his copartner purchased a tract of land in the woods some twenty miles from their Waupaca plant, and located a small portable mill there for the purpose of logging off the land, and cutting the logs into lumber for use at such plant. The operations in the woods, prior to the date mentioned, had progressed to the extent that most of the logging had been done. The assured then went there to personally superintend the business, and continued in such occupation up to the time of his injury. On the 17th day of July he went into the woods to look after the operations there in progress. While so doing, with an ax he attempted to cut away an elm tree top that interfered in getting to some logs, and in doing so cut his foot, from the effects of which, it is alleged, he subsequently died.

No request was made of the association to arbitrate the question of liability. The complaint was in the usual form, ignoring the second classification made in response to the assured's notification of change of occupation of April 30, 1892. The amount claimed in the complaint was $3,000. The answer, among other things, pleaded in abatement the arbitration clause of the certificate, and failure on the part of the beneficiary to comply therewith. It set up the facts in respect to the work the assured was doing at the time he was injured, his occupation for some time prior thereto, and alleged that it placed him in class 6, as a lumberman in the woods,—death indemnity, $1,000; and alleged that, if he was not in such class, but was a mill owner, superintending only, he was in class 3, and entitled to but $2,000.

At the close of the plaintiff's case defendant's counsel moved for a nonsuit, which was refused, and due exception

was taken. The jury rendered a special verdict, in which all the facts were found in plaintiff's favor. Among others, were the following findings: "Q. At the time of the accident and injury, was the occupation of deceased that of mill owner, overseeing only? A. Yes. Q. At the time of the accident and injury, was the occupation of deceased that of lumberman in the woods? A. No. Q. At the time of the accident and injury, was the occupation of deceased that of lumberman overseeing in the woods, not working? A. No. Q. At the time of the accident and injury, was the occupation of deceased that of proprietor of mill and superintendent only? A. No." A motion was thereupon made to set aside the verdict, and for a new trial on the minutes of the court, on exceptions to the charge, and because the same was contrary to the evidence. Proper exceptions were taken and preserved to raise the questions discussed. Judgment was rendered in plaintiff's favor, and defendant appealed.

For the appellant there was a brief by *Paul H. Sanborn*, attorney, and *R. J. Burglehaus*, of counsel, and oral argument by *Mr. Burglehaus*.

For the respondent there was a brief by *E. L. & E. E. Browne*, attorneys, and *Bump, Kreutzer & Rosenberry*, of counsel, and oral argument by *Mr. E. E. Browne*.

MARSHALL, J. Counsel for the appellant claim that the learned circuit judge erred in not nonsuiting the plaintiff, because the contract of insurance prohibits any suit other than to enforce payment of an award of arbitrators, except upon the refusal of the association to arbitrate. The contract was clearly so worded as to require all questions between the association and the assured to be, at its option, settled by arbitration, and to thereby wholly oust the court of jurisdiction over every part of the subject of liability and the amount thereof as well. On grounds of public policy, all agreements between parties to submit the whole subject

matter of their differences to arbitration, wholly stipulating away the rights of each or either party to resort to the tribunals created by the law of the land for a determination of such differences, are void, and have been uniformly so held. *Hamilton v. Liverpool, L. & G. Ins. Co.* 136 U. S. 242; May, Ins. § 492; *Leach v. Republic F. Ins. Co.* 58 N. H. 245. Agreements to arbitrate special matters, such as, under an insurance policy, the amount of the loss, something that does not go to the whole groundwork of the controversy, have been as universally sustained. *Viney v. Bignold*, 20 Q. B. Div. 172; *Scott v. Avery*, 5 H. L. Cas. 811; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250; *Reed v. Washington F. & M. Ins. Co.* 138 Mass. 572; *Wolff v. Liverpool & L. & G. Ins. Co.* 50 N. J. Law, 453; *Hall v. Norwalk F. Ins. Co.* 57 Conn. 105. It is not here contended, as we understand it, that the contract in question belongs to the first class, or that a general provision requiring the whole subject of a controversy to be submitted to arbitration can ordinarily be sustained, but it is contended that such contract is of a class which forms an exception to the general rule, because, as said by counsel for appellant, the association is purely a mutual company; that its contracts are between certificate holders; and that any inexpensive method they may see fit to adopt to settle their differences should be upheld. No authority is brought to our attention to support such contention, and we may safely say that none exists, and that there is no reasonable theory upon which it can rest. There is no exception to the rule that parties cannot wholly deprive themselves, by contract, of the right to resort to the courts of the country to settle controversies between them; hence it necessarily follows that the ruling of the trial court that the arbitration clause in the certificate under consideration was void at the election of either of the parties must be sustained.

Error is assigned on the refusal of the trial court to set

aside the answers to questions 4, 5, 6, and 7, as contrary to the evidence. The idea of appellant's counsel is that, from the location of the mill and the general nature of the business, the assured was a lumberman in the woods, and that the fact should have been so found. The questions were peculiarly for the jury, and we see no reasons to disturb their findings. To be sure, the mill the deceased was overseeing was in the woods, and was a small, portable affair, located temporarily some distance from the main business in which the deceased was engaged, for use in cutting into lumber logs taken from a small tract of land there situate, for transportation to the Waupaca factory. But the question is not, necessarily, whether the sawmill enterprise was essentially a part of the Waupaca business, but is rather, What was the occupation deceased was engaged in when he was injured, and, if different from that named in the certificate, was it one classified by the association as more hazardous than the one so named? Certainly there is evidence to sustain the finding that the deceased was a mill owner, superintending only. It will serve no valuable purpose to recite the evidence in that regard. Suffice it to say that it is ample to support the verdict. A sawmill is such, whether great or small. Neither its size, nor the place of its location, determines its character. A mill in a settled community obviously does not change its character because located in the timber at a distance from town, city, or village.

Error is assigned on the instruction given to the jury to the effect that, if they determined the occupation the deceased was engaged in when injured by an affirmative answer to one of the questions, they must necessarily answer the other questions on that subject in the negative, as he could have had but one occupation in that place at that time. Such instruction appears to be free from error. The deceased had been overseeing the business of operat-

ing the mill in the woods, and the work incident to it, exclusively for about three months. Therefore, when the jury determined what that occupation was from the evidence, they could not consistently say it was any other. A finding in the affirmative as to one question in effect operated to negative all the rest on the same subject.

It was also assigned for error that the trial court overruled defendant's motion for the direction of a verdict in plaintiff's favor for $1,000. That has been, in effect, disposed of by what has preceded, unless the fact be that the assured was injured through an exposure outside of the occupation mentioned in the contract as found by the jury, and that such mere "*exposure*" affects the degree of liability. The contract says: "If the assured is injured in any occupation or exposure *classified by the association as more hazardous* than that here given, his insurance and weekly indemnity shall only be so much as the premiums paid by him will purchase at the rates fixed for such increased hazard." By the scheme of insurance under which the contract in question was made, *acts and exposures were not classified; occupations were.* The term "exposure" does not appear, on that account, to have any particular legal significance, if any. The classification was solely of *occupations.* The question here presented has been repeatedly before the courts, and it has been uniformly held that a particular exposure under such a contract of insurance, though not in pursuit of, and as a part of, the business or occupation mentioned in the certificate, is not material to affect the liability of the assurer. In *Miller v. Travelers' Ins. Co.* 39 Minn. 548, the assured was named in the certificate as a banker, which was one of the least hazardous of occupations. He was injured when carelessly endeavoring to board a railroad train. The policy contained a provision to the effect that, in case of an injury to the insured from any occupation or exposure classified by the company as more hazardous than that stated

in the policy, the indemnity rating should be correspondingly reduced. The court held that the words "occupation" or "exposure" referred exclusively to classified occupations, and that the mere act of the assured in exposing himself to an increased hazard, not in an occupation or business, did not affect the liability of the company. To the same effect are *Hall v. Am. M. Acc. Asso.* 86 Wis. 518; *North Am. L. & Acc. Ins. Co. v. Burroughs*, 69 Pa. St. 43; *Stone's Adm'r v. U. S. Casualty Co.* 34 N. J. Law, 375; *Union Mut. Acc. Asso. v. Frohard*, 134 Ill. 228; Niblack, Ben. Soc. & Acc. Ins. § 413. Such cases are distinguishable from those where the assured was temporarily actually engaged in a more hazardous business than the one designated in his certificate, as in *Aldrich v. Mercantile M. Acc. Asso.* 149 Mass. 457; also from those where the contract, in effect, provided that the doing of an act *pertaining to an occupation more hazardous* should reduce the liability of the assurer to the indemnity corresponding to such more hazardous occupation. *Eggenberger v. Guarantee M. Acc. Asso.* 41 Fed. Rep. 172.

The most serious question in this case is whether, upon the verdict and the undisputed evidence, the plaintiff was entitled to a judgment of $3,000. To determine such question we must necessarily look to the contract, and see what that was at the time the deceased was injured. That seems to have been lost sight of in the court below, or, otherwise, that the contract was construed to provide that the indemnity should be determined by the occupation of the assured at the time of the injury, whether classified as more or less hazardous than that named in the certificate. It is quite clear that the appellant's scheme of insurance contemplated, as to each certificate holder, a contract locating such certificate holder in a particular class, and specifying, as nearly as practicable, his actual occupation; not necessarily an occupation corresponding exactly to a classified risk. In the absence of any change of occupation to one classified as

more hazardous than the one *classified by the certificate*, the class named therein, not the occupation, governs the indemnity rating. The occupation becomes significant only in case of a change to one *classified as more hazardous than that named in the certificate, or classified thereby.* The happening of such an event, without any other act on the part of the assured, or modification of the written contract, changes his location from the higher to the lower class. Whether the occupation named in the contract, and therein placed in a particular class, corresponds substantially with an occupation classified by the rules of the company or not, any change to one not so classified, and as more hazardous, does not affect the liability of the assurer. The clause of the contract in that regard is self-acting in respect to the assurer in one direction only. It may locate the assured, by reason of his conduct alone, in a lower class than the one named in the certificate, but not in a higher. So the important question is, In what class was the assured, by his contract, at the time of his injury? To determine that, reference must be had to what passed between the association and the deceased, after the certificate was changed from class 1 to class 2.

It is our opinion that the letter of the assured of April 30, 1892, notifying the company that he had changed his occupation from that of mill owner, overseeing only, to mill owner, etc., occupation salesman and supervisor of yard and mill, with occasional duties to operate machines in the factory for an hour or two at a time, and the reply to such communication, sent by the association to the assured May 9, 1892, that he had been changed from class 2 to class 3, occupation salesman and general supervisor of lumber mill and yard, not working, as effectually modified the contract as if the change had been actually written into the certificate. The notification given to the association, and the reply thereto, together with the certificate, became the con-

tract, and so continued down to the time of the accident, and was binding between the parties to fix the amount of indemnity in the absence of proof of a change of occupation so as to reduce the assured to a lower class than class 3. Therefore, notwithstanding the verdict, and taking all the facts as found by the jury to be verities in the case, they did not change the written contract, which indisputably entitled plaintiff to $2,000 only. The fact that by the contract the deceased was in class 3 being established by undisputed evidence, for the purposes of this appeal such fact must be treated as if actually incorporated in the special verdict. *Murphey v. Weil*, 89 Wis. 146. So the verdict stands, in effect, thus: The deceased, when injured, was insured by the terms of the written contract in class 3; death indemnity, $2,000. His actual occupation, when injured, was that of mill owner, overseeing only. It was not an occupation classified as more hazardous than that named in the certificate.

It follows from what has preceded that the verdict of the jury is not sufficient to sustain the judgment rendered. Hence such judgment must be reversed, and the cause remanded for a new trial, unless the plaintiff elects to take judgment for $2,000, with interest and costs.

By the Court.— So ordered.

INGLES, Respondent, vs. MERRIMAN, Appellant.
INGLES, Appellant, vs. MERRIMAN, Respondent.

May 6 — May 21, 1897.

Equity: Correction of errors in conveyances of land: Tax titles: Costs.

1. The owner of a block in a village sold lots 1, 2, 7, and 8, and the north half of lots 3 and 6, but by mistake the conveyance described the

premises, with reference to a wrongly numbered copy of the plat, as lots 1, 2, 3, and 8, and the north half of lots 4 and 7. Subsequently he sold the remainder of the block to another purchaser, describing it as lots 5 and 6 and the south half of lots 4 and 7, instead of lots 4 and 5, and the south half of lots 3 and 6. The purchasers respectively went into possession of the premises supposed to have been purchased, and subsequently sold them, using the same descriptions as had been employed in their grantor's deed. *Held*, that a purchaser of the first tract who received his conveyance without knowledge of the mistake in the description might maintain an action in equity against a purchaser of the other tract, who took title with knowledge of such mistake, to compel the execution of the necessary conveyances to remedy the error.

2. The defendant in such case by purchasing a tax deed on the south half of lots 4 and 7, with knowledge of the error in the conveyances and tax proceedings, acquired no additional rights therein, even though such purchase was made before she received her conveyance of the fee.

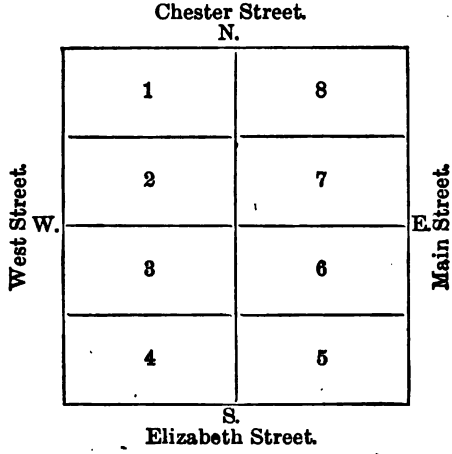
3. Where the plaintiff in an action for the reformation of a deed recovered a judgment compelling an exchange of conveyances between the parties to correct the errors complained of, it was not an abuse of discretion to refuse costs to her because she had not tendered her deed before commencing the action.

APPEALS from a judgment of the circuit court for Waushara county: JOHN GOODLAND, Judge. *Affirmed.*

This is an action in equity to compel the defendant to convey to the plaintiff two half lots of land upon the plaintiff's conveying to the defendant two other half lots in the same block in the village of Plainfield, Wisconsin. The action was tried by the court, and the facts, as found by the court, were in substance as follows:

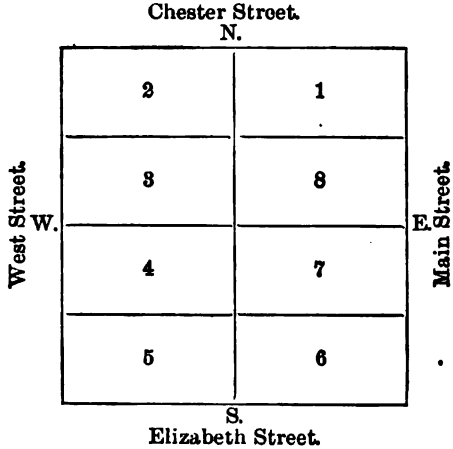
In 1857 one Betsy Waterman owned and platted what is known as the "First Addition of the Village of Plainfield," which addition contains sixteen blocks, one of which blocks was called "Block K." Said block contained eight lots, each eight rods long by four rods in width. This plat was duly recorded, and upon such recorded plat block K appeared, with the lots numbered as set forth in the following diagram:

RECORDED PLAT, BLOCK K.



At the same time a copy, or what was supposed to be a copy, of this plat, was made and kept by Mrs. Waterman, and from this copy deeds were drawn to those who subsequently purchased the lots in such addition. By a mistake of the draughtsman the lots were numbered differently in this copy, and appeared as shown in this diagram:

UNRECORDED PLAT, BLOCK K.



In the year 1859, or about that time, Betsy Waterman sold and conveyed the north four lots and the north half of the next two lots of the block, but by mistake described the property so sold as lots 1, 2, 3, and 8, and the north half of lots 4 and 7. It will be seen that, according to the unrecorded plat, this was a correct description of the piece of land supposed to be conveyed, but, according to the recorded plat, was entirely incorrect. The purchasers of this land went into possession and occupation of the parcel of land which they supposed had been conveyed to them, and occupied the same down to the year 1894, when the plaintiff purchased the same and went into possession thereof; said erroneous description running through all of the various deeds, including the deed to the plaintiff. The remainder of the block (that is, the south two lots and the south half of the adjoining two lots) was deeded by Betsy Waterman in 1857 to other parties, who went into possession thereof. The same mistake was made in the deeds of these other parcels as was noted in the deeds in regard to the first parcel. The lots were named as set forth in the unrecorded plat, and not as set forth in the recorded plat.

The defendant, *Eva Merriman*, purchased the said south two lots in 1892, and the adjoining two half lots in 1894, knowing when she purchased that the descriptions were erroneous on account of being made according to the unrecorded plat; in other words, she had full knowledge of the mistake which had been made from the beginning in the description of the two parcels of land. Just prior to this purchase in 1894 she obtained a tax deed of the south half of lots 4 and 7, which she immediately placed upon record.

The court found as conclusions of law that the plaintiff was the owner of the north four lots and the north half of the next two lots of the block, and was entitled to have a conveyance from defendant of the north half of lot 6 and the south half of lot 7 in the recorded plat, and that the de-

fendant was the owner of the south two lots and the two half lots immediately adjoining them, and was entitled to a conveyance from the plaintiff of the south half of lot 3 and the north half of lot 4; further, that the tax deed conveyed no title to the defendant of any of the property owned by the plaintiff, and that no costs should be allowed to either party. From that part of the judgment requiring conveyances to be made the defendant appealed, and from that part of the judgment refusing costs to the plaintiff the plaintiff appealed.

For the plaintiff the cause was submitted on the brief of *Cate, Sanborn, Lamoreux & Park.*

S. A. Corning, for the defendant.

WINSLOW, J. No exceptions to the findings of fact or conclusions of law were preserved in the bill of exceptions; hence the only question before us is whether the pleadings and findings sustain the judgment. *Wille v. Bartz*, 88 Wis. 424.

This seems a very appropriate case for the exercise of the remedial powers of a court of equity. In effect, it is an action for the reformation of deeds. The plaintiff purchased her land in August, 1894. Both she and her grantors purchased and took possession of a certain tract of land, ten rods by sixteen rods, on the north end of the block, which they supposed was correctly described in their deeds. In fact, it was correctly described according to the unrecorded plat which was used in making the various conveyances, but incorrectly described according to the recorded plat which must govern. The same state of facts existed with reference to the deeds and the purchase and possession of the grantors of the defendant. They bought and occupied the balance of the block on the south under a description correct according to the unrecorded plat, and incorrect according to the recorded plat. The defendant purchased knowing

of the mistake in the descriptions, and of the extent of the occupation of the various grantors. To say that the defendant can now claim and hold the lands included within the calls of her deed according to the recorded plat, when she knew as matter of fact, at the time of her purchase, that such calls referred to the unrecorded plat, would be to allow justice to miscarry most grievously. The circuit court rightly held that a court of equity would set right the errors and compel the execution of the necessary conveyances to accomplish that result. Courts will correct and reform descriptions in deeds not only where the mistake consists of the insertion or omission of words, but also where the parties understood the language of the deed, and believed it corresponded with the actual boundaries of the land, but were mistaken. *Bush v. Hicks*, 60 N. Y. 298. And such errors may be corrected as between subsequent grantees with notice as well as between the original parties. *May v. Adams*, 58 Vt. 74; *Warburton v. Lauman*, 2 G. Greene, 420.

The tax deed covering the south half of lot 4, which the defendant bought in 1894, just before she purchased the south half of lots 4 and 7, plainly does not help her, because she then knew of the errors in the numbering of the lots, both in the conveyances and in the tax proceedings, and under these circumstances her purchase of the certificates would amount simply to payment of her own taxes.

Upon the defendant's appeal the judgment must be affirmed.

The plaintiff appeals because costs were not allowed her. The allowance of costs was within the discretion of the trial court. This discretion is a legal discretion. R. S. sec. 2918. Costs are not to be refused to the prevailing party in the absence of special circumstances reasonably sufficient to require a departure from the ordinary rule. *Spengler v. Hahn*, 95 Wis. 472. We suppose costs were refused here because the plaintiff did not tender her deed before action com-

menced, but waited until the trial of the action. The rule is well known that in equitable actions, where a tender of money is essential, if the plaintiff makes no tender before action brought it will generally defeat his right to recover costs. The cases are analogous, and we cannot say that there was an abuse of discretion in refusing the plaintiff costs.

By the Court.— Judgment affirmed on both appeals.

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HYDE, Respondent, vs. GERMAN NATIONAL BANK OF OSHKOSH, imp., Appellant.

May 7 — May 21, 1897.

Appealable order: Reference: Jurisdiction: Consent.

1. In an action for an accounting the trial judge after a hearing filed findings of fact and conclusions of law and ordered that upon the basis thereby determined an accounting be had. No other judgment or order was entered. *Held*, that the order was an order of reference for taking an account, which did not determine the rights of any of the parties, and was therefore not appealable under ch. 212, Laws of 1895.
2. Consent of the parties cannot confer jurisdiction upon the supreme court to entertain an appeal.

APPEAL from an order of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Appeal dismissed.*

This action was brought by the plaintiff to compel the defendant the *German National Bank of Oshkosh* to account for the proceeds of certain lumber and timber cut from lands claimed to belong to the plaintiff, which the defendant bank claimed to hold as security for certain loans made to the plaintiff and to the defendant the Paulding Lumber Company.

The plaintiff bought certain standing timber in Michigan,

and in order to pay the purchase price he borrowed certain moneys of the *German National Bank* and J. H. Jenkins, and pledged his contract for the timber as security for payment. He made a contract with the defendant the Paulding Lumber Company, by which he sold a portion of the timber thus bought by him to that company, and the latter pledged its contract to the bank as security for advances. The plaintiff, and also the Paulding Lumber Company, carried on logging operations on said lands, and he claimed to have made advances to the Paulding Lumber Company to enable it to carry on such operations, and the said lumber company claimed to have made advances to the plaintiff to enable him to carry on his logging operations. The *German National Bank* claimed to have advanced moneys to purchase supplies, and carry on the logging operations, both by the plaintiff, *Welcome Hyde*, and by the defendant the Paulding Lumber Company. The proceeds from the sales of the timber and lumber cut on the lands had been deposited in the said bank, and it claimed a lien on all these proceeds for the payment of all its advances, both to the plaintiff and to the Paulding Lumber Company, while the plaintiff claimed that only the loans of the bank to him should be satisfied out of the proceeds of his timber, and that he had the first lien and claim on the remainder of the moneys held by the bank by virtue of his contract with the Paulding Lumber Company, and for advances made by him to that company. The defendant the *German National Bank* claimed that both the plaintiff and the Paulding Lumber Company had agreed that they would carry on logging operations on all the lands as a joint enterprise, and that all the advances by the bank to both the plaintiff and to the Paulding Lumber Company should first be paid out of the proceeds of the logging operations, and that all the plaintiff's, as well as the Paulding Lumber Company's, interests in the lands, and the timber thereon, and logs, lumber cut therefrom, etc., were pledged

and hypothecated to the bank and said Jenkins as security for the advances and loans made by them to both the plaintiff and the Paulding Lumber Company, and that the bank and Jenkins had a first lien on the proceeds for the satisfaction of their respective claims.

The parties had stipulated that "there be first tried and adjudged by the circuit court the question on what basis the accounting shall be had, and particularly that there be first tried and adjudged the question whether the property of the plaintiff, *Welcome Hyde*, was pledged to the defendant the *German National Bank* or to J. H. Jenkins, or both of them, as security for the debts of the Paulding Lumber Company, and that either party should have a right to appeal from the determination of the circuit court as to the basis on which the accounting should be had, and that neither party be compelled to proceed to an accounting in court until determination by the supreme court as to such basis, and particularly as to whether the property of the plaintiff was pledged to the *German National Bank* or to J. H. Jenkins, or both of them, as security for the debts of the Paulding Lumber Company, or J. H. Weed, or Margaret Weed." An order was entered, directing that the issues in the action be tried as provided in the stipulation.

The circuit court, after the trial, gave its opinion as follows: "First. *Welcome Hyde* did not, at any time nor in any manner, pledge his property to pay the debts of the Paulding Lumber Company or J. H. Weed. Second. The *German National Bank* has no lien whatever upon the property of *Welcome Hyde*, except for debts owing by him to said bank and to J. H. Jenkins, understood to aggregate, exclusive of interest, about the sum of $8,000. Third. The said bank has a lien upon the property of the Paulding Lumber Company for supplies furnished for it, which is superior to *Hyde's* lien upon the same property for supplies furnished by him to the Paulding Lumber Company pursuant to the

contract of March, 1894." The court made a finding of facts and conclusions of law, embracing substantially the points mentioned, and ordered that an accounting be had between the parties upon the basis determined by said finding of facts and the conclusions of law, stating the same, and that it should "embrace and ascertain separately: (1) The amount loaned by the *German National Bank* to the Paulding Lumber Company and to others at its request, to secure the payment of which the interest of the Paulding Lumber Company in the contract from the plaintiff to it, marked 'B,' was pledged to the said bank December 30, 1892. (2) The amount of moneys paid by the *German National Bank* to discharge liens upon said property. (3) The amount of moneys advanced by the plaintiff, *Hyde*, to the Paulding Lumber Company to carry on the lumbering business upon the lands described in said contract 'B,' under the contract of March 1, 1894. (4) The amount of money furnished by *Hyde* to discharge liens upon said property. (5) The account of the Paulding Lumber Company against *Hyde* on all accounts whatever."

There were various exceptions to the finding of facts and conclusions of law, but no judgment was entered thereon, and no other or further order except said order of reference. The defendant the *German National Bank* appealed from said order as from a final judgment.

For the appellant there was a brief by *Barbers & Beglinger*, and oral argument by *Charles Barber*.

For the respondent there were briefs by *Hooper & Hooper*, and oral argument by *Moses Hooper*.

PINNEY, J. The order from which the defendant the *German National Bank* has appealed as from a final judgment is simply an order of reference for taking an account, and does not determine, or purport to determine, the rights of the parties in any respect whatever. It is not within the

class of appealable orders. Laws of 1895, ch. 212. The result of the accounting was designed, it is presumed, to form the basis of the final judgment in the action, yet to be rendered. There has been no final adjudication of any part of the merits of the action. "In our practice there is no such thing as an interlocutory judgment, and there can be but one final judgment in the case, and that must dispose of all the issues and rights of the parties." *Trustees of St. Clara Female Academy v. Delaware Ins. Co.* 93 Wis. 58, 69; *Sellers v. Union Lumbering Co.* 36 Wis. 398; *Scott v. Reese*, 38 Wis. 636; *Singer v. Heller*, 40 Wis. 544; *Treat v. Hiles*, 75 Wis. 265; *Sherman v. Menominee River L. Co.* 77 Wis. 23; *Gage v. Allen*, 84 Wis. 330. As was said by COLE, J., in *Sellers v. Union Lumbering Co., supra:* "The distinction is broad between an *order* and a *judgment*, and they are not to be confounded in practice." And as we held in *Trustees of St. Clara Female Academy v. Delaware Ins. Co., supra:* "The merits of the case, in whole or in part, cannot be adjudicated or determined by a mere order. This is the appropriate office of a final judgment." There have been only certain findings of fact, but from these no appeal could be taken. This action is one of a class in which the former equity practice of making an interlocutory decree in order to get the case in a fit condition for final hearing and judgment would be convenient and serviceable, but the practice that there can be no such judgment is too well settled to be questioned. And if a mere order could supply, in any degree, the place of such a judgment, it would not fall within the category of appealable orders. The court is therefore without jurisdiction of the subject matter submitted. Consent could not confer it.

By the Court.— The defendant's appeal is dismissed.

FREDERICK, Respondent, vs. DOUGLAS COUNTY and others, Appellants.

February 27 — June 11, 1897.

Counties: Enjoining payment of money: Action by one taxpayer on behalf of all: Parties: District attorney: Power of county board to employ another attorney: Recovery of money illegally paid: Estoppel: Voluntary payment.

1. Under sec. 2604, R. S., a taxpayer, property owner, and voter in a county, regardless of the amount of taxes paid, may maintain an action on behalf of himself and all other taxpayers of the county to restrain the illegal payment of money by the county and its officers.
2. Where a county has a duly qualified and acting district attorney, the board of supervisors has no authority to employ another attorney to take charge of and conduct in the circuit court for that county tax litigation in which the county is interested, the district attorney being a constitutional officer, elected by the people and charged by sec. 752, S. & B. Ann. Stats., with the prosecution and defense of all actions or proceedings in that court in which the county is interested as a party.
3. The mere fact that public officers have voluntarily and with knowledge of the facts paid out money for services actually rendered in pursuance of an illegal and unwarranted contract will not prevent a recovery thereof in a proper action brought on behalf of the public. CASSODAY, C. J., dissents.
4. In an action brought by a taxpayer on behalf of all persons interested to restrain payment of an attorney illegally employed by a county board of supervisors to defend tax litigation against the county, and to recover back money already paid to such attorney, it appeared, among other things, that the attorney's employment became a matter of public notoriety within a short time after it was made; that both he and the county board acted in entire good faith; that he performed large and valuable services running through several months; that he had fully earned all the money which had been paid him; and that during all such time the plaintiff and his fellow taxpayers remained silent and allowed the services to be rendered and the money paid without objection. *Held*, that under all the circumstances a court of equity would not require the attorney to return the money.

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117 [4]543

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed in part; reversed in part.*

This action was commenced November 16, 1895, by the plaintiff, for himself and all other taxpayers of said county, to restrain the county and its officers from paying to the defendant *H. H. Grace*, or issuing warrants to him for the payment of, anything whatever for or on account of his services as attorney, rendered or to be rendered to the county, and to compel the said *Grace* to pay back to the county $2,012, which had previously been paid to him. The defendants having severally answered, and the cause having been tried, the court found the facts in effect as follows:

Prior to January 1, 1895, John A. Murphy was the duly elected, qualified, and acting district attorney of said county. Charles J. Monson was the duly elected, qualified, and acting district attorney of that county from January 1, 1895, to July 5, 1895, when he died; and H. C. Sloan was duly appointed as his successor, and has been the duly qualified and acting district attorney of said county since July 17, 1895, and is still such district attorney.

January 23, 1895, the board of supervisors of said county being duly convened, there was introduced, without the request and knowledge of the then district attorney, a resolution as follows: "Resolved, that *H. H. Grace* is hereby employed to assist the district attorney in the prosecution and defense of all tax cases and civil actions pending or hereafter commenced, in which the county of *Douglas* is a party." Said resolution was, upon motion, duly referred to a committee of three, with full power to act. Two members of said committee informed the district attorney that they had employed said *Grace* to take charge of the tax cases against the county. The district attorney expressed his pleasure at being relieved of said cases for the time being. February

16, 1895, said committee completed arrangements with *Grace* to take charge of and conduct the tax cases for the time being, under an agreement whereby *Grace* should be paid the same compensation or fees that he would charge other clients for similar work. Under this agreement, *Grace* began work on the tax cases February 16, 1895. The reason the board so hired *Grace* was that they did not think Monson competent to properly conduct the defense of said cases; and that he did not have sufficient time to properly attend to them. Monson was about thirty-one years of age, and had been practicing law four or five years, and had only a limited experience in tax litigation. The board allowed two bills presented by *Grace* for his services to April 18, 1895, for the aggregate amount of $225.

June 10, 1895, a resolution reciting that *Grace* had been employed to assist the district attorney in all cases commenced against said county was introduced and adopted by the board. Said resolution appropriated $1,000 to *Grace* in payment of the necessary expenses in the defense of the tax cases, the balance, if any, remaining from said sum after said cases were fully determined, to apply in payment of his services. At that time a large number of new cases had been begun, and were pending in the circuit court for Douglas county, against the county. The board, with the consent of Monson, then adopted a resolution to the effect that *Grace* was thereby retained as attorney for the county, to take charge of and defend all tax cases pending or thereafter commenced against the county or county officers, and the several county officers were thereby directed to turn over all papers relating to the same as soon as served, to enable him to keep a proper record of the same. August 17, 1895, a resolution was passed by said board appropriating $1,500 to *Grace* for fees, costs, and expenses in said tax cases. Said *Grace* was paid the several amounts so allowed in the aggre-

gate to the amount of $2,615, before the commencement of this action, including amounts disbursed by him.

On November 6, 1895, the board, knowing that 188 tax cases were then pending, and with the consent of the district attorney, agreed with *Grace* to allow the balance of his bill of $1,461.80, for services performed prior to November 1, 1895; that he be employed to assist the district attorney in looking after all tax cases then pending against the county, and all cases that might be commenced against the county for the term of one year commencing November 1, 1895; that his compensation therefor be fixed at the sum of $4,000, which was to be in full for his legal services and that of his stenographer during said year, but not to include disbursements; and that warrants be drawn by the chairman and clerk on the county treasurer, payable to *Grace* quarterly, in advance, for the sum of $1,000 each.

Neither Monson nor Sloan at any time made application to the board for assistance, or requested to be relieved from the defense of said tax cases, but, on the contrary, the board acted on its own motion, and Monson and Sloan each acquiesced. The county had paid *Grace*, for services rendered by him in defending cases against said county pending in the circuit court, above disbursements, in the aggregate the sum of $2,012.

As conclusions of law, the court found, in effect, that the board had no power or authority to employ *Grace* to take charge of and defend the tax cases mentioned, or to assist the district attorney in the defense of said cases, and bind the county for the value of such services; that such employment was illegal and void, both for the year prior and the year subsequent to November 1, 1895; that *Grace* was a trustee of the county for the amounts received by him from said county for such services, in all to the sum of $2,012, and that he account for and pay over the same to said county;

and that an injunction should be granted in accordance with the prayer contained in the amended complaint.

From the judgment entered thereon accordingly, and the whole and every part thereof, the defendants bring this appeal.

For the appellants there was a brief by *Butler & Grace*, *H. C. Sloan*, and *C. R. Fridley*, and oral argument by *A. L. Sanborn* and *H. H. Grace*. They contended, *inter alia*, that the county board had power to employ counsel to assist the district attorney in civil cases in the circuit court. *Smith v. Mayor of Sacramento*, 13 Cal. 533; *Hornblower v. Duden*, 35 id. 664; *Scollay v. Butte Co.* 67 id. 249; *Detroit v. Whittemore*, 27 Mich. 280; *State v. Paterson*, 40 N. J. Law, 186; *Taylor v. Umatilla Co.* 6 Oreg. 394; *McCabe v. Comm'rs of Fountain Co.* 46 Ind. 380; *Comm'rs of Cass Co. v. Ross*, id. 404; *Comm'rs of Ripley Co. v. Ward*, 69 id. 441; *Chester Co. v. Barber*, 97 Pa. St. 455; *State ex rel. De Lany v. Franklin Co.* 21 Ohio St. 648; *Clough v. Hart*, 8 Kan. 487; *Thatcher v. Jefferson Co.* 13 id. 182; *Doster v. Howe*, 28 id. 353; *Franklin Co. v. Layman*, 145 Ill. 138; *City Nat. Bank v. Presidio Co.* 26 S. W. Rep. 775; *Jordon v. Osceola Co.* 59 Iowa, 388; *Tatlock v. Louisa Co.* 46 id. 138; *Taylor Co. v. Standley*, 79 id. 666.

T. L. McIntosh, for the respondent, to the point that the county board had no authority to employ the defendant *Grace* to conduct the tax litigation in question, cited *Orton v. State*, 12 Wis. 509; *Randall v. State*, 16 id. 340; *Tenney v. State*, 27 id. 387; *State v. Duff*, 83 id. 291; *Beal v. St. Croix Co.* 13 id. 500; *McDonald v. Milwaukee Co.* 41 id. 642; *Montgomery v. Jackson Co.* 22 id. 69; *Eagle River v. Oneida Co.* 86 id. 269; *Clough v. Hart*, 8 Kan. 487; *Morrill v. Douglas*, 14 id. 293, 306; *Platte Co. v. Gerrard*, 12 Neb. 244; *Cuming Co. v. Tate*, 10 id. 193; *Lyddy v. Long Island City*, 104 N. Y. 218; *Miller v. Embree*, 88 Ind. 133; *State v. Paterson*, 40 N. J. Law, 186; *Ramson v. New York*,

24 Barb. 226; Tiedeman, Mun. Corp. 176; *Bryan v. Page*, 51 Tex. 532.

CASSODAY, C. J. 1. It is contended that although the plaintiff, *Frederick*, is a taxpayer, property owner, and voter in the county, yet that the amount of taxes paid by him was so small that he should not be allowed to maintain this action. The statute provides that "when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." R. S. sec. 2604. "This statute has been construed as merely re-enacting the rules which prevailed in equity, and which otherwise might have been held to be abolished by the Code." *Day v. Buckingham*, 87 Wis. 220. The action in the case at bar "is one of a common or general interest of many persons." It is for the benefit of the taxpayers of the county, and may properly be brought, as this is, by one taxpayer "for himself and all taxpayers of said county." *Id.; Nevil v. Clifford*, 55 Wis. 161; *Willard v. Comstock*, 58 Wis. 565; *Bay Land & Imp. Co. v. Washburn*, 79 Wis. 423. We must hold that there was no error in not dismissing the complaint for want of a proper party plaintiff.

2. The more important question is whether the county had authority to employ the defendant *Grace* as attorney to take charge of and conduct the tax suits mentioned. It is conceded that the county had a district attorney, as prescribed by law, during the period covered by such employment. "Counties are, at most, but local organizations, which, for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence. They are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action

of the people who inhabit them. . . . They are purely auxiliaries of the state; and to the general statutes of the state they owe their creation, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject. Considered with respect to the limited number of their corporate powers, the bodies above named rank low down in the scale or grade of corporate existence, and hence have been frequently termed '*quasi* corporations.'" 1 Dillon, Mun. Corp. §§ 23, 25; 1 Beach, Pub. Corp. § 8; *Beal v. St. Croix Co.* 13 Wis. 500; *Hoffman v. Chippewa Co.* 77 Wis. 214. The statutes prescribe the general powers of counties. S. & B. Ann. Stats. secs. 650, 652, 669, 670, 694. One of these sections provides that the county board shall have the power "to represent the county, and to have . . . the management of the business and concerns of the county in all cases where no other provision shall be made." S. & B. Ann. Stats. sec. 669, subd. 6. Another of these sections, as amended, provides that "the county board at their annual meeting in November shall fix the amount of salary which shall be received by every county officer, including county judge, who is to be elected in the county during the ensuing year, and is entitled to receive a salary payable out of the county treasury, and the salary so fixed shall not be increased or diminished during his term of office. All salaries shall be paid out of the county treasury monthly, at the end of each month. All salaries, the amounts whereof have heretofore been declared and fixed by the county board at any time, or heretofore established by law, shall be and remain the salaries of such officers until the county board shall fix the amounts thereof in accordance with the provisions of this section, and when such amount is once fixed by the county board, it shall be and remain as the salary of such officer until changed as herein provided." S. & B. Ann. Stats. sec. 694; Laws of 1893, ch. 225. The statute author-

izes the circuit court to appoint a suitable person to perform the duties of the district attorney, where there is no such officer for the county, or when he is absent or has been of counsel for or is near of kin to the accused. R. S. sec. 750. "The district attorney shall receive for compensation the salary fixed by the county board, *and no more.*" R. S. sec. 751. The duties of the district attorney are prescribed by statute, and they include the defending of all the tax cases in question in the circuit court for Douglas county. S. & B. Ann. Stats. sec. 752. The circuit judges, within their respective circuits, are authorized, in their discretion, to appoint counsel to assist the district attorney in the prosecution of persons charged with certain crimes. S. & B. Ann. Stats. sec. 752*a;* *Weisbrod v. Winnebago Co.* 20 Wis. 419. But it is not permissible for private persons to employ and pay such assistant. *Biemel v. State*, 71 Wis. 444; *Bird v. State*, 77 Wis. 276; *Richards v. State*, 82 Wis. 177; *State v. Russell*, 83 Wis. 330. The statutes also provide that in counties containing 100,000 inhabitants the district attorney may nominate and appoint assistants. S. & B. Ann. Stats. sec. 752*b;* Laws of 1893, ch. 94. But nowhere in the statutes do we find any authority for the county board to employ counsel to take charge of and conduct tax litigation in the circuit court, as in the case at bar; and, as indicated, the board only had such powers as were expressly granted by statute, or necessarily implied therefrom. *Meinzer v. Racine*, 68 Wis. 245, 246, and cases there cited. This court has expressly held that "the county board of supervisors has no authority to employ, at the expense of the county, an attorney to aid the district attorney in a criminal prosecution." *Montgomery v. Jackson Co.* 22 Wis. 69. In a later case this court held, in effect, that neither the sheriff *nor the county board* had any authority to employ counsel at the expense of the county to attend the hearing upon *habeas corpus*, in behalf of a person detained on a criminal accusation. *Mc-*

Donald v. Milwaukee Co. 41 Wis. 642. These rulings have received sanction in later cases. *Manitowoc Co. v. Sullivan*, 51 Wis. 118; *Cutts v. Rock Co.* 58 Wis. 642; *State v. Duff*, 83 Wis. 291.

The district attorney was a constitutional officer, chosen by the electors of the county. Const. art. VI, sec. 4. He took his office *cum onere;* and the county board had no authority to employ *Grace* to take charge of and conduct the tax litigation mentioned, in the circuit court for Douglas county. For the reasons given, we are all agreed that the county was properly enjoined from making any further payments to *Grace.*

3. The question recurs whether *Grace* can be compelled to pay back to the county the $2,012 which he actually received for services actually rendered. There is no question but that the county was involved in a very large and unusual amount of tax litigation, and that the district attorney was unable to attend to all the litigation of the county as it should be attended to, and that *Mr. Grace* rendered a very large amount of very valuable services for the county, and that he ought, in equity and good conscience, to have a reasonable compensation for such services actually rendered. We are all agreed that, upon the facts and circumstances of this case, *Mr. Grace* cannot be compelled to pay back the money he actually received for such services before the commencement of this action. A majority of the court seem to reach such conclusion on the ground that the action is barred by laches; and I have requested them to file an opinion herein, giving their reasons for such conclusion.

It is obvious that, if the county could not recover back the money, then the plaintiff, as a taxpayer, cannot compel such repayment. The fact that *Grace* claimed the money for services actually rendered, and that the county voluntarily paid the same, with full knowledge of all the facts, under the circumstances mentioned, is sufficient, in my judg-

ment, to bar the county from such recovery. Such is the general rule of law. *Farmer v. Arundel*, 2 W. Bl. 824; *Brisbane v. Dacres*, 5 Taunt. 143; *Bilbie v. Lumley*, 2 East, 469; *Benson v. Monroe*, 7 Cush. 125; *Livermore v. Peru*, 55 Me. 469; *McCrickart v. Pittsburgh*, 88 Pa. St. 133; *Peebles v. Pittsburgh*, 101 Pa. St. 304. And this is the rule even where the party paying is under no legal obligations to pay, and where the party receiving has no legal right to recover. *Id.* A learned author, speaking of laches, acquiescence, payment, and retention of the consideration as grounds of estoppel, says: "As experience shows that the officers of public and municipal corporations do not guard the interest confided to them with the same vigilance and fidelity that characterize the officers of private corporations, the principle of ratification by laches or delay should be more cautiously applied to the former than to the latter. But the principle applies to both classes of corporations, as well as to natural persons. The general doctrine is undoubted that there is ordinarily no estoppel in respect to acts which are in violation of the constitution or of an act of the legislature, or which are obviously, and in the strict and proper sense of the term, *ultra vires*. . . . We mean by it, as here used, the want of legislative power, under any circumstances or conditions, to do the particular act in question." 1 Dillon, Mun. Corp. (4th ed.), § 548.

As indicated, the county, with full knowledge of the facts, voluntarily paid the money, and is not here asking to have it paid back. It is obvious, from the statutes cited upon the other branch of the case, that under certain circumstances a county may be legally required to pay counsel for assisting the district attorney in legal controversies. The statute, however, did not authorize such payment in the case at bar. But there was no statute prohibiting such payment, nor was such payment contrary to any principle of the common law or of good morals. So far as this branch of the case is con-

cerned, the action is essentially an action for money had and received. In all such actions, in the absence of mistake, deceit, fraud, duress, oppression, or undue influence, the party seeking to recover, or in whose behalf recovery is sought, must be equitably entitled to a repayment of the money, or no recovery can be had or repayment compelled. Thus, it has been held that "taxes collected under a state statute which is afterwards declared unconstitutional cannot be recovered back if no protest or objection is made against the payment of such taxes." *Taylor v. Board of Health*, 31 Pa. St. 73; *S. C.* 72 Am. Dec. 724. So, it has been held that "a collector of the revenue is not personally liable in an action to recover back an excess of duties paid as collector, and by him, in the regular or ordinary course of his duty, paid into the treasury of the United States; he (the collector) acting in good faith, and under instructions from the treasury department, and no protest being made at the time of payment, or notice not to pay the money over, or intention to sue to recover back the amount given him." *Elliott v. Swartwout*, 10 Pet. 137. This rule applies as well to a payment made by one municipal corporation to another municipal corporation, as to a payment by one individual to another. *Board of Comm'rs of Macon Co. v. Board of Comm'rs of Jackson Co.* 75 N. C. 240.

The same principle is well illustrated by a case in this court. *Fay v. Lovejoy*, 20 Wis. 403. That case was under a statute making usurious contracts void as to the agreement for interest, but valid as to the principal sum loaned. The question involved was whether payments made *as interest* could be recovered back, or applied as part payment of the principal sum loaned, and this court held that they could not. In that case, DIXON, C. J., giving the opinion of the court, said: "All the authorities agree that, when interest money has been paid and applied as such with the consent of the borrower, only the illegal excess can be recovered back.

The reason is that equity never favors a forfeiture, and will not, unless bound down by statute, lend its aid to enforce one, but will, as a condition of relief, hold the party to the performance of that which is just and equitable. . . . If, therefore, he has paid the interest, a court of equity will not aid him to get it back, *within the lawful rate*, though the lender had no action to compel its payment. And the rule is the same in an action at law for money had and received, to recover it back; or if the borrower set off the interest money paid against the principal sum in a legal action of the lender to recover that. Money had and received, though legal in form, is in its nature an equitable remedy, and lies only where the defendant has received money which, *ex æquo et bono*, he ought to refund. The fact, therefore, that the statute forfeits all interest, or provides that no interest shall be recovered, does not give the borrower a right to recover it back, where it has once been paid. Many of the cases in which it is held that there can be no such recovery arose under statutes which forfeit both principal and interest. It was competent for the defendant in this case to waive the forfeiture and pay the interest; and, so far as he has done so, the payment within the rate allowed by law will not be disturbed." *Fay v. Lovejoy*, 20 Wis. 405. To the same effect, *Blewett v. McRae*, 88 Wis. 280; *Birkhauser v. Schmitt*, 45 Wis. 316.

By the Court.—That portion of the judgment adjudging that *Mr. Grace* holds the $2,012 as trustee of the county, and requiring him to account for and pay over the same to the county or into court for the benefit of the county, is reversed, and the judgment in all other respects is affirmed, but without costs to either party in this court, except that the appellants are to pay the fees of the clerk of this court.

WINSLOW, J. As indicated in the foregoing opinion of the chief justice, all the members of this court agree that

Mr. Grace cannot be compelled to pay back the money he has actually received for the legal services rendered by him to the county prior to the commencement of this action, but the remaining members of the court do not agree with the chief justice as to the legal grounds upon which such decision should be based, and I have been requested by my colleagues to present, as best I may, their views upon that subject.

In our judgment, it would be dangerous to hold that because *Mr. Grace* had actually rendered services, and the county had voluntarily paid for the same with knowledge of the facts, such money so paid could not be recovered. There are many cases which hold that, as between man and man, money paid voluntarily, with knowledge of all the facts, and without fraud or duress, cannot be recovered merely on account of ignorance or mistake of the law. A number of these cases are cited in the opinion of the chief justice, and it is not my province to combat this principle. This is simply the doctrine of voluntary payment. It is frequently applied to the payment of illegal taxes. It is founded upon the general principle that a man may do what he will with his own. He may give it away, or buy his peace; and, if he does so with knowledge of the facts, he is generally remediless. But public officials do not stand upon the same basis. They are not dealing with their own. They are trustees for the taxpayers, and, in dealing with public funds, they are dealing with trust funds. All who deal with them know also that the public officials are acting in this trust capacity. To hold that, when public officers have paid out money in pursuance of an illegal and unwarranted contract, such moneys cannot be recovered in a proper action brought upon behalf of the public, merely because the payment has been voluntarily made for services actually rendered, would be to introduce a vicious principle into municipal law, and a principle which would necessarily sweep

away many of the safeguards now surrounding the administration of public affairs. Were this, in fact, the law, it can readily be seen that public officials could at all times, with a little ingenuity, subvert and nullify that wholesome principle of the law which prohibits their spending the public funds for illegal purposes. All that would be necessary to be done would be to make the contract, have the labor performed, pay out the money, and the public would be remediless. We cannot approve of such a doctrine. The rules of law concerning ratification and estoppel, as applied to the illegal or unauthorized acts of public officials, are simple and well understood. A municipal corporation may undoubtedly ratify an unauthorized contract made by its agents, which is within the general scope of its corporate powers; but it is equally certain that it cannot ratify such unauthorized acts of its agents as are beyond its scope, or such contracts as it had no power to make originally. *Trester v. Sheboygan*, 87 Wis. 496; *Koch v. Milwaukee*, 89 Wis. 220. Ratification and estoppel are of very much the same nature, and the principles which apply to ratification substantially apply also to estoppel. As said by Mr. Dillon in the passage quoted by the chief justice: "The general doctrine is undoubted that there is ordinarily no estoppel in respect to acts which are in violation of the constitution or of an act of the legislature, or which are obviously, and in the strict and proper sense of the term, *ultra vires*. . . . We mean by it, as here used, the want of legislative power, under any circumstances or conditions, to do the particular act in question." This passage, we believe, expresses the law with clearness. This court decides in the present case that "the county board had no authority to employ *Mr. Grace* to take charge of and conduct the tax litigation mentioned." They had no authority under any circumstances then existing, because they had a district attorney qualified and acting. Therefore the employment of *Mr. Grace* was

to the full extent an act beyond their power, and hence incapable of ratification.

It is not difficult to find cases holding to the full extent the doctrine that where public officers have made an illegal appropriation of public money, and the money has been paid, it may be recovered in a proper action brought either by the corporation or by taxpayers on behalf of the public. Such actions have generally been actions in equity brought to restrain the further misappropriation of funds, and as an incident of full relief to recover back moneys already paid; and it may be stated as a uniform rule that in such cases such moneys may be recovered back, especially where there is any ground to charge fraud, corruption, or concealment in the transaction. A case in point is that of *Russell v. Tate*, 52 Ark. 541, 7 L. R. A. 180, in which an illegal appropriation of town funds was made to aid in completing a county court house. A part of the appropriation was paid over immediately. As said in the opinion: "The appropriation was made, and the warrant drawn, and the money paid by the treasurer, before an attorney could have comprehended the situation and written the caption of a complaint." And the court held that the amount already paid could be recovered, as well as that there should be an injunction against any further payment, thus doing complete justice in one action. Other cases in which voluntary payments by municipal officials have been recovered back may be cited, as follows: *Demarest v. New Barbadoes*, 40 N. J. Law, 604; *Weeks v. Texarkana*, 50 Ark. 81; *Tacoma v. Lillis*, 4 Wash. 797, 18 L. R. A. 372. The principle is also recognized in *Willard v. Comstock*, 58 Wis. 565. But while we believe it to be salutary and a correct principle of law to hold that moneys paid out by municipal officials in violation of law may be recovered from the recipient in an action seasonably brought, especially where the transaction is marked by haste, fraud, collusion, or concealment, we believe there

are cases in which the circumstances are such that a court of equity ought not to decree the return of money merely because the appropriation thereof was unauthorized, and such a case we believe to be before us now.

The evidence and the findings show that *Mr. Grace's* employment began in January, 1895, and it was a matter of public notoriety, and the plaintiff himself and presumably all taxpayers who kept track of the public proceedings knew that he was employed as early as the spring of 1895; that he performed large and valuable services, for which he was from time to time paid; and that not only he, but the county board, acted in entire good faith in the matter. There was no haste and no evidence of collusion or concealment. *Mr. Grace's* services ran through a number of months, and he undoubtedly has fully earned all the money which has been paid him. During all this time the plaintiff and his fellow taxpayers remained silent, and allowed the services to be rendered and the money to be paid. They took no action until the latter part of November, 1895. Then they came into a court of equity, and asked for the stoppage of all payments in the future, and to this they are undoubtedly entitled. But he who comes into a court of equity must do equity. Could it, under any view of the circumstances, be said to be equitable to compel *Mr. Grace* to pay back the money which he received for long and valuable labors, rendered honestly and in good faith, the benefit of which the corporation has received, and concerning which the taxpayers of Superior were, or ought to have been, fully informed during their entire progress? Were a court of equity to make this judgment under the circumstances, we should regard it as having become an engine of oppression, rather than an instrument of justice. We do not rest this decision entirely upon the ground that the remedy has been lost by laches, or that the county has become estopped, but upon the ground that under all the circumstances, the plaintiff having invoked the relief

of a court of equity, that court, in granting the relief, will not take away the fruit of honest labor. *Macon v. Huff*, 60 Ga. 221.

JONES and another, Respondents, vs. ROBERTS and another, Appellants.

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March 18 — June 11, 1897.

Wills: Probate: Court and jury: Immaterial errors: Mental competency: Expert testimony: Proof of execution: Costs, when payable out of estate: Rehearing: Appeal: Guardian ad litem.

1. In a proceeding in the circuit court to probate a will errors of the trial court in instructing the jury and in exerting undue pressure to secure an agreement, are not material, the proceeding being equitable and the verdict advisory merely.
2. A finding of fact that a testatrix was mentally competent at the time of the execution of a will will not be disturbed as against the preponderance of the evidence because contrary to the testimony of a large number of experts and non-experts that she was of unsound mind, where there was credible evidence respecting her actions before, at the time, and after, the will was executed, indicating that she fully comprehended what she was doing when she made it, and that her acts were uninfluenced by any person; it being the province of the court or jury to give such opinion evidence so much weight only as they may conclude it to be entitled to, or to reject it altogether.
3. Where a person signs his will by making his mark, and it is otherwise properly executed, it may be established, even when contested, by the evidence of one subscribing witness and the testimony that the other actually signed as such, together with corroborating evidence sufficient to satisfy the court of all the statutory requisites, if the absence of the witness not produced is satisfactorily accounted for.
4. The proper practice to secure the modification of a judgment in a contested will case so as to make the costs payable out of the estate is by motion for that purpose and not by motion for a rehearing.
5. Where the contestant of a will has acted in good faith in taking an appeal to the supreme court, and the questions of law or fact involved are worthy of consideration, the court will order the costs taxed against him on the appeal to be paid out of the estate.

6. Sec. 4041*a*, S. & B. Ann. Stats. (prohibiting the payment of the costs of an unsuccessful contestant out of the estate, except in certain cases), is applicable only to costs in the county and circuit courts.
7. A guardian *ad litem* may take an appeal without leave of court, and it is his duty to do so if, after a careful examination of the case, he deems that course necessary for the protection of his ward.

APPEAL from a judgment of the circuit court for Waukesha county: WARHAM PARKS, Circuit Judge. *Affirmed.*

Susan Jones, an old lady about seventy-five years of age, who could not read or write, died, leaving in the possession of one Morris Jones an instrument purporting to be her last will and testament, disposing of property of the value of about $1,400. The evidence tends to show that such instrument was drawn at the testator's request by Dr. Vernon, her family physician, was signed by her by making her mark, was witnessed by Dr. Vernon and George Greesley, and thereafter delivered to Morris Jones by the testator, with instructions to keep it until her death and then deliver it to the county judge. The will was delivered according to the deceased's instructions, and on the proceedings before the county judge to have the same proven and admitted to probate such judge decided that the instrument was void for want of testamentary capacity of the testator. An appeal was taken from such decision to the circuit court. On the trial of such appeal a jury was impaneled, and a verdict taken respecting certain questions of fact. Various exceptions were taken to the instructions given by the trial court to the jury, and to the conduct of the trial judge in respect to calling the jury from their jury room occasionally, during their deliberations, and admonishing them to agree upon a verdict.

On consideration of the evidence by the trial judge, the verdict of the jury was adopted, and findings were thereupon duly filed, in substance as follows: (1) That the testator signed the instrument purporting to be her last will

and testament April 12, 1894, and that she then knew its contents; (2) that she signed the same in the presence of T. H. Vernon and George Greesley, who then and there, in her presence, and in the presence of each other, subscribed their names thereto as witnesses; (3) that at the time of such witnessing and signing the testator was of sound and disposing mind, and that she made such will of her own free will; (4) that the execution of the will was duly established, and entitled to be admitted to probate accordingly.

In accordance with such findings, judgment was entered reversing the judgment of the county court, and establishing the will, and admitting the same to probate. Various exceptions to such findings, and to the conclusions of the trial court, were properly filed, and an appeal taken from the judgment to this court by the contestants.

For the appellants there was a brief by *Carney, Clasen & Walsh*, and oral argument by *E. D. Walsh*. They contended, *inter alia*, that in New York under a statute similar to our own probate of a will will be denied when the testimony of one subscribing witness, proving all the facts essential to the execution of a will by the testator's mark, is wholly uncorroborated by any person who knew the fact of the mark being affixed by the testator. *In re Phelps' Will*, 5 N. Y. Supp. 270; *In re Walsh's Will*, 1 Tuck. 132; *In re Reynolds*, 4 Dem. Sur. 68; *In re Smith's Will*, 15 N. Y. Supp. 425; *Rugg v. Rugg*, 83 N. Y. 592; *Robinson v. Brewster*, 140 Ill. 649; *Hobart v. Hobart*, 154 Ill. 610; *Warden v. Van Gieson*, 6 Dem. Sur. 237.

For the respondents there was a brief by *T. C. Martin*, attorney, and *Chafin & Parkinson*, of counsel, and oral argument by *E. W. Chafin*.

The following opinion was filed April 7, 1897:

MARSHALL, J. The errors assigned on exceptions to the instructions to the jury, and the manner such jury was

pressed by the trial judge to agree upon a verdict, need not be discussed at length. Whether any of such instructions were erroneous or not, or whether there was undue pressure from the bench to secure an agreement by such jury, is not material, inasmuch as the verdict was only advisory in character. This being an equity case, where the right to a trial by jury was not a matter of right but of judicial discretion, the trial court might, at any stage of the case, in the exercise of such discretion, have revoked the submission of questions of fact to a jury, and determined them for itself, or have entirely disregarded their verdict in the making up of its finding. *Will of Carroll*, 50 Wis. 437; *Gunn v. Madigan*, 28 Wis. 158; *Gill v. Rice*, 13 Wis. 549; *Williams v. Williams*, 82 Wis. 393.

Error is assigned on exceptions to the findings of fact respecting the testamentary capacity of the testator. We fail to find any legitimate basis for disturbing such findings. The rule applies that findings of fact made by the trial court can be disturbed only when it clearly appears that they are contrary to the preponderance of the evidence, and that there is no legitimate basis in such evidence upon which they can stand. To be sure, there is a large amount of evidence by non-experts, and some by experts, that the testator was of unsound mind when the will was made. But there is considerable credible evidence respecting how the testator acted before, at the time of, and after the will was executed, indicating that she comprehended fully what she was doing when she made the will, and that she acted uninfluenced by any other person. Hence the presiding judge, who had the benefit of seeing the witnesses and hearing them testify, might very properly have rejected mere opinion evidence of a large number of witnesses that the deceased was not of sound mind. Such evidence, even when given by experts, is often of the most unsatisfactory character and entitled to little or no weight. It is for the court or jury to give to

such evidence just such weight as such court or jury may conclude the same is entitled to. It may be given controlling influence if, from the whole case, a conclusion is reached that it is entitled to that weight; and it may be rejected altogether if the conclusion is reached that it is not of sufficient weight to influence the result. In *Barrett v. Hall*, 1 Mason, 448, Mr. Justice STORY said that he could not recollect a case calling for opinion evidence that abundance of it could not be produced on both sides equally credible. In *Daniels v. Foster*, 26 Wis. 686, DIXON, C. J., said: "The unsatisfactory nature of such evidence is well known. The facility with which great numbers of witnesses may be marshaled on both sides of such a question, all calling themselves experts, . . . and equally honest, and confident that his own theory or opinion is the only correct one, and yet all on one side directly opposing all on the other, admonishes us of the fallibility of such testimony, and of the great degree of allowance with which it must be received." These expressions of learned judges accord with our common experience. We cannot say that the trial judge gave too little weight to the large amount of opinion evidence produced.

The only other alleged error that need be specially referred to is that the court erred in finding that the will was properly executed on the testimony of one witness. It was argued that under sec. 3788, R. S., which provides that, if the will is not contested, "the court may, in its discretion, grant probate thereof on the testimony of one of the subscribing witnesses only, if such witness shall testify that such will was executed in all particulars as required by chapter one hundred and three, and that the testator was of a sound mind at the time of the execution thereof," in effect requires more evidence than that of one subscribing witness if the will be contested, especially when the testator signs by a mark. Several New York cases are cited to sustain such

contention. In the first place, it must be observed that the rule adopted in such cases is based on the New York statute, which is different from that of this state; and, second, that our statute only provides a rule that the court may be governed by in noncontested cases, leaving all others as governed by the established practice on the subject, which, by the great weight of authority, requires the production of only one witness if the other be dead or his testimony cannot be procured on account of absence or otherwise. Schouler, Wills, § 179; 6 Wait, Act. & Def. 384. The furthest the New York courts have gone, even under their statute, which requires the testimony of two subscribing witnesses, or, if they cannot be produced, of their handwriting and that of the testator, in cases where the signature of the testator is by his mark, is that, if only one subscribing witness is produced, there must be corroborating evidence or circumstances. *In re Simpson's Will*, 2 Redf. 29; *In re Smith's Will*, 15 N. Y. Supp. 425.

We are not referred to any authority, and we are unable to find any, except *In re Walsh's Will*, 1 Tuck. 132, which was thereafter overruled, which holds that the testimony of two subscribing witnesses is necessary in a case of this kind. Here there was the testimony of one subscribing witness, who testified to all the statutory requisites, and that the other subscribing witness signed as such in his presence. That the instrument is what it purports to be is corroborated by the testimony of *Mary Roberts* to the effect that she went to Dr. Vernon's office with the testator, at her request, to have the will drawn; that at the request of the testator and Dr. Vernon she made a memorandum in writing of what the testator desired to have put in the will, and left the paper with Dr. Vernon, who testified that he drew the will accordingly. Then there is the testimony that the testator, immediately after the will was executed, took it into her pos-

session. Then the testimony of Morris Jones to the effect that the testator brought the paper to him at his house; that she had theretofore told him that she was going to have her will changed, speaking of a will previously drawn; that when she brought the paper in question to his house she handed it to him, saying that it was her will, and that she desired him to keep it till her death, and then deliver it to the county judge. Even if the rule which prevails under the New York statute were to be applied, the foregoing corroborating evidence would be sufficient, with the evidence of one subscribing witness, to *prima facie* prove the execution of the will, and establish it. In short, we hold that where a person executes his will by signing by his mark, and it is otherwise properly executed, it may be established, even when contested, by the evidence of one subscribing witness and the testimony that the other actually signed as such, together with corroborating evidence sufficient to satisfy the court of all the statutory requisites, if the absence of the witness not produced is satisfactorily accounted for.

By the Court.—The judgment of the circuit court is affirmed.

The following opinion was filed June 11, 1897:

MARSHALL, J. A motion for a rehearing was made in this case solely for the purpose of obtaining a direction that the costs taxed in this court against the appellants be paid out of the estate of the testator. A rehearing for that purpose is not necessary. Therefore, in accordance with the uniform practice in such cases, the rehearing must be denied, but the motion considered, nevertheless, as one relating to the subject of costs, and disposed of in that regard in accordance with the rights of the parties.

The established rule is, where the contestant of a will has acted in good faith in taking an appeal to this court, and

the questions of law or fact involved are worthy of consideration, to order the costs taxed against such contestant paid out of the estate. *Will of Smith*, 52 Wis. 543; *Will of Silverthorn*, 68 Wis. 372; *In re Pierce's Estate*, 56 Wis. 560. In our opinion this case comes within that rule. Sec. 4041*a*, S. & B. Ann. Stats., relating to costs of contestants, refers solely to county and circuit courts. It does not affect the rule which has always prevailed in this court. The fact that one of the appellants was represented by a guardian *ad litem*, and that he took the appeal without leave of court, does not affect the question of costs. He not only had a right to take the appeal, but it was his duty to do so, if, after a careful examination of the case, he deemed that course necessary for the protection of his ward. *Tyson v. Tyson*, 94 Wis. 225.

By the Court.— The motion for a rehearing is denied, but without costs, and it is ordered that there be added at the foot of the judgment a direction that the costs taxed and allowed according to law against the appellants be paid out of the estate of the deceased, Susan Jones.

J. A. Fay & Egan Company and others, Respondents, vs. Brown, Appellant, and Northwestern Car & Machine Company and others, Respondents.

May 1—June 11, 1897.

(1) *Contracts: Construction: "Day."* (2–4) *Corporations: Mortgage to stockholder:* Bona fide *purchaser: Sufficiency of interest to raise objection: Laborers' claims: Payment by stockholder personally liable: Preference.*

1. An agreement by the promoters of a corporation to construct and operate in a certain city a car factory with a capacity of ten new box cars per day, upon condition that certain citizens should de-

nate a site and a specified bonus, is not fulfilled so as to entitle the corporation to a conveyance of the site unless it appears that the factory erected is capable of constructing the specified number of cars in an ordinary working day of ten hours.

2. A promoter of a corporation, who takes a mortgage from it upon land which it holds under a contract entitling it to a conveyance upon the completion of a factory thereon as specified in the contract, is not an innocent purchaser, and therefore acquires no greater interest in the premises than the corporation had.

3. The corporation in such case having lost its interest in the land by failure to comply with the contract, the mortgagee had no interest therein which would entitle him to raise the objection that there had been an error in determining the quantity of land upon which a mechanic's lien should be adjudged.

4. One of the stockholders of a corporation which never became legally authorized to do business paid laborers' claims for work done for the corporation immediately prior to the appointment of a receiver. *Held*, that he was not entitled to a preference under sec. 2787*a*, S. & B. Ann. Stats., since he was personally liable for the debts of the corporation under sec. 1773, R. S.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is a consolidated action composed of a mechanic's lien action and a creditors' bill to sequestrate the property and wind up the affairs of an insolvent corporation. The leading facts out of which the litigation arose may be briefly stated as follows:

Early in 1893 the defendant *James L. Brown* and one Anderson came to Oshkosh with a scheme for locating and building at that place a large plant for the construction of freight cars. They succeeded in interesting some of the citizens of Oshkosh, and finally made an agreement with a committee of citizens to construct and operate in Oshkosh a car factory with a capacity of ten new box cars per day, upon condition that the citizens of Oshkosh should donate to them thirty acres of land and a bonus of $25,000. Thereupon *Brown* and Anderson and some associates formed a corporation called the *Northwestern Car & Machine Com-*

pany with a nominal capital stock of $500,000. This corporation immediately commenced to erect large buildings, and in so doing incurred debts for building materials and machinery furnished, which debts are the foundation of the mechanic's lien action. No cash was paid for stock in the corporation exceeding $600. *Mr. James L. Brown*, the appellant, who was a stockholder in the corporation, claims to have advanced to the corporation about $36,000, to secure which he claims to hold a valid mortgage upon the personal property of the corporation, and also upon the real estate upon which the plant was erected. *Mr. Brown* also obtained a judgment by confession for $36,000 against the corporation, and commenced a sequestration action against the corporation, and procured the appointment of a receiver. The last-named action was commenced a few days after the lien action, and by consent the two actions were consolidated, and tried together, and the conflicting claims of the lien claimants, and of *Mr. Brown* as mortgagee and judgment creditor, and of the citizens who agreed to pay the money bonus and contribute the real estate, formed the various subjects of controversy in this litigation.

After a long trial, the court made findings of fact, in substance as follows: (1) That the *Northwestern Car & Machine Company* was organized as a corporation on the 28th of March, 1893, for the principal purpose of manufacturing cars of all kinds, with a capital stock of $500,000, in shares of $100 each, and of this amount $200,000 was subscribed for, as follows: *J. L. Brown*, one share; P. E. Brown, Jr., one share; P. E. Brown, one share; W. A. Ryan, one share; R. F. Delaronde, one share; P. Des Lauriers, one share; F. Adolphus Anderson, 1,994 shares; that *J. L. Brown* paid $100 for his share; that Ryan paid nothing for the share subscribed for by him; that as for the shares subscribed for by P. E. Brown, P. E. Brown, Jr., Delaronde, and Des Lauriers there is no satisfactory evidence that anything was paid for them; that

the only payment made by Anderson for his said shares was a transfer to the company of 1,246 shares of the capital stock of the Northwestern Despatch Fast Freight Line, a New Jersey corporation, which was afterwards transferred as collateral security to the *Niles Tool Works Company*, one of the lien claimants, and on this trial surrendered by the *Niles Tool Works Company* to the receiver, and that said stock is now of no value; that said company claimed to issue also $100,000 preferred stock to Anderson, but that nothing was ever paid therefor, but that it was intended that such preferred stock should be distributed among the promoters of the scheme as being for the bonus of land and money subscribed by the citizens of Oshkosh.

(2) That in the spring of 1893 negotiations were had between the corporation and certain citizens of Oshkosh with a view to locating this plant in Oshkosh in consideration of a bonus of land and money, which negotiations resulted in an agreement by which the corporation agreed to build a car plant on certain property in said city, capable of turning out ten new box cars per day, in consideration whereof said citizens agreed, upon the completion of said plant with the capacity aforesaid, "said capacity to be determined by a competent judge or judges familiar with such work," to pay said corporation a cash bonus of $25,000, and to deed to the corporation twenty-five acres of land, including the land upon which the buildings were to be erected, as a site for the factory. The title to the land was placed in the name of the defendant *Choate* in trust to carry out the agreement upon the completion of the shops. Said *Choate* also assumed the responsibility of collecting and turning over to the corporation the cash bonus, and gave the corporation a bond to that effect. The erection of the buildings and machinery thereupon proceeded with rapidity.

(3) That the owners of the real estate and the said *Choate*

all knew of the erection of the buildings, and consented thereto.

(4) That the various lien claimants particularly named in the findings furnished materials and performed labor about the erection and construction of such buildings to the amount set forth in the findings; the gross amount of such liens being about $35,000.

(5) That the defendant *J. L. Brown* holds what purports to be a mortgage for more than $36,000 upon the real estate which the citizens of Oshkosh contracted to deed to the corporation, which mortgage bears date November 4, 1893, but that said mortgage is void because never authorized at a meeting of the stockholders of the corporation.

(6) That said corporation never had any capital beyond a few hundred dollars, but was absolutely insolvent from the day it started, and this fact was known to both *J. L. Brown* and Anderson, who were the real managers of the enterprise.

(7) That the defendant *J. L. Brown* also claims to hold a chattel mortgage upon the personal property of the corporation to secure said pretended indebtedness, but that said chattel mortgage was never authorized by the stockholders of the corporation.

(8) That said pretended chattel mortgage and pretended real estate mortgage attempted to convey all the property of the corporation to *Brown*, a stockholder of the corporation, to secure a preference to him over all other creditors of the corporation.

(9) That *Mr. Brown* actually advanced to the corporation $26,400, for which sum he is entitled to be paid *pro rata* with the other unsecured creditors out of any funds applicable to such payments after the payment of the lien claimants and other secured creditors.

(10) That the corporation has never in fact performed its

contract with *Mr. Choate*, nor earned its bonus, either of land or money, because it has never operated a plant capable of constructing ten new box cars per day, but that its capacity, as determined by competent judges, was to construct five box cars per day only.

(11) That one acre of the land cannot be taken out of the tract so as to include all the buildings and appurtenances, and that there are five separate and distinct buildings, and that it is necessary to take one acre in connection with each building, so that a lien is given upon five acres of land in a compact form upon which the buildings are located.

(12) That at the time of the appointment of the receiver herein certain claims for labor were unpaid, and that *Mr. J. L. Brown* paid the same, amounting to the sum of $4,236, but that he paid them under an agreement with the receiver, made before the receiver accepted the receivership, that he would pay and discharge such claims.

The legal conclusions from these findings were, in brief, to the effect that the lien claimants had good and valid liens upon the buildings and five acres of land; that *Mr. Brown's* real estate and chattel mortgages gave him no liens; that the real estate and money bonuses had neither of them been earned; that *Mr. Brown's* position was simply that of an unsecured creditor for the amounts by him advanced to the corporation. Judgment was entered adjudging the amounts of the various lien claims, and that the five acres of land aforesaid, and the buildings thereon, be sold to pay the same, or so much of said claims as the proceeds will pay; that the real estate and chattel mortgages held by *Brown* be canceled and set aside; that the real estate and money bonus had been forfeited; that *James L. Brown* was an unsecured creditor to the extent of $30,636; that the personal property of the corporation be sold, and the proceeds used by the receiver to discharge the expenses of the receivership, and that the surplus, if there be any, be distributed

ratably among the unsecured creditors. From this judgment *Brown* appealed.

For the appellant there were briefs by *Runnells & Burry* and *Felker, Stewart & Felker*, and oral argument by *L. C. Brooks*. They contended, *inter alia*, that the word "day" in jurisprudence means, as a general rule, the twenty-four hours elapsing between one midnight and the next succeeding midnight. Black, Law Dict.; Anderson, Law Dict.; 5 Am. & Eng. Ency. of Law, 81; 2 Bl. Comm. 141. And when used in a contract or statute, unless restricted by its terms to a shorter period, means the twenty-four hours. *Benson v. Adams*, 69 Ind. 354; *Helphenstine v. Vincennes Nat. Bank*, 65 id. 589; *Zimmerman v. Cowan*, 107 Ill. 631; *People ex rel. Harless v. Hatch*, 33 id. 136; *Pulling v. People*, 8 Barb. 385; *Haines v. State*, 7 Tex. App. 33; *Price v. Tucker*, 5 La. Ann. 514; *Kane v. Comm.* 89 Pa. St. 522.

For the respondents there were separate briefs by *M. C. Phillips*, attorney, and *Phillips & Hicks*, of counsel, for the *J. A. Fay & Egan Co.* and others; *C. D. Cleveland*, counsel for *Choate* and *Lull; Hooper & Hooper*, attorneys for the *Niles Tool Works Co.*; and *Thompson, Harshaw & Thompson*, attorneys for *W. D. Allen & Co.* and others; and the cause was argued orally by *J. C. Thompson, Ben. Hooper*, and *Mr. Cleveland*.

WINSLOW, J. The claims of the appellant, *Brown*, are in brief: (1) That the real estate and money bonus had been earned; (2) that his real estate and chattel mortgages are valid; (3) that the lien claimants should not have been given a lien on more than one acre; (4) that he should have been allowed at least $5,000 more upon his claim; (5) that he should have been given a first lien on labor claims paid by him just before and just after the appointment of the receiver.

1. This was a corporation organized apparently for the

prime purpose of obtaining the large bonus offered by the citizens of Oshkosh, and incidentally for the manufacture of freight cars. It is forcibly, though perhaps inelegantly, described in the brief of counsel for the respondent *Choate* as a "corporation with a capital *on paper* of $500,000,— actual capital stock paid for, not to exceed $300,— the balance of $499,700 was *wind*." The manipulators of the scheme were *Mr. J. L. Brown* and Mr. F. Adolphus Anderson. They succeeded in producing a plant for the manufacture of cars which actually made and finished five freight cars. It was plastered with mechanics' liens and claims for unpaid machinery bills to the extent of about $35,000. A large portion of the machinery was placed in the buildings simply upon conditional contracts of sale, which reserved title in the vendors until the machinery was paid for. Experts examined it, and pronounced it capable of producing five cars during the ordinary working day of ten hours. This is the plant which was tendered to the confiding and public-spirited citizens of Oshkosh as a full compliance with the agreement to build and complete a plant capable of constructing ten new box cars per day.

It may well be doubted whether a plant which was covered with liens which the company could not discharge, and which were fast ripening into title, could, in any event, be considered as a compliance with the contract. It would seem like keeping the promise to the ear and breaking it to the hope. But, aside from this question, the fact that the evidence shows that the plant was never capable of constructing or turning out more than five box cars per day is conclusive. The agreement was to complete a plant capable of constructing and turning out "ten new box cars per day." We agree entirely with the trial court in construing the word "day" as here used to mean the ordinary working day, and not as meaning twenty-four hours. It is claimed that the evidence shows that by running night and day with two shifts of men, the works could construct ten cars within

twenty-four hours, and that this should be held a performance of the contract; but this claim seems to us entirely untenable. Words used in a contract are to be construed in their ordinary sense as commonly used, and not in a strained or unusual sense. The word "day," used in this connection, usually, if not universally, means an ordinary working day.

2. This finding of fact to the effect that the plant was never completed so as to earn the bonus of land and money really disposes of the major portion of the appellant's claims. If the land was never earned by the corporation, then *Mr. Brown's* mortgage upon the land gave him no lien, because he was not an innocent purchaser, and could get no greater interest than the company had, and that had none. Furthermore, it is found by the court upon evidence which we regard as sufficient that the execution of these mortgages upon the entire real and personal property of the company was never authorized by the company. There may be other complete defenses to the mortgages shown by the evidence, but it is unnecessary to pursue the subject further.

3. As to the claim that it was error to adjudge mechanics' liens upon more than one acre of land, it is sufficient to say that the appellant, *Brown*, has no interest in this matter which entitles him to question the judgment in this regard. Having no mortgage lien upon the land in any event, he is not prejudiced by the judgment of lien upon five acres. No one who has any interest in the land has appealed from this part of the judgment.

4. The claim that *Brown* should have been allowed $5,000 more upon his claim is based upon some evidence showing that he turned over $5,000 face value of certain corporate bonds to the E. P. Allis Company as collateral security for the purchase of engines and boilers by the corporation. It appears by the findings that these bonds were returned to *Brown* when *Choate* purchased the Allis claim and that he (*Brown*) then turned them over to Anderson, after which there is no evidence to show what became of them. The

court concluded upon these facts that if *Brown* has any claim upon any one for them it is upon Anderson individually, and in this conclusion we agree.

5. It appears that *Mr. Brown* paid something over $4,000 to laborers who had been working in the shop, just prior to the appointment of the receiver, and he claims that he should be allowed this amount as a preferred creditor under sec. 2787*a*, S. & B. Ann. Stats. There are a number of complete answers to this proposition, but one will serve. In paying these laborers *Mr. Brown* was simply paying his own debt. The corporation had never been legally organized, as required by sec. 1773, R. S., so that it could do business with others than its members. It is very doubtful whether half of its capital had ever been subscribed, and it is absolutely certain that twenty per cent. had never been paid in. *Mr. Brown* was and is a stockholder. He so alleges in his complaint in this action, and that allegation has never been withdrawn, and he is bound by it. In paying these laborers he was but paying his own debt, and he can have no preference therefor.

Some other minor contentions are made, but they possess no merit.

By the Court.—Judgment affirmed.

HIBBARD, Respondent, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

96 443
102 626
96 443
106 195
106 197

May 21—June 11, 1897.

Railroads: Injury to warehouseman sealing car: Fellow-servants: Negligence: Statutory liability.

A warehouseman of a railroad company who was injured, while sealing the doors of a car attached to an engine, through the negligence of the engineer or fireman in suddenly moving the engine, was

not employed in "operating, running, riding upon, or switching" trains or cars, within the meaning of ch. 229, Laws of 1893, providing that a railway employee so engaged may recover for injuries caused by the negligence of another employee in the performance of his duties.

APPEAL from a judgment of the circuit court for St. Croix county: O. B. WYMAN, Judge. *Reversed.*

The facts are stated in the opinion.

For the appellant there was a brief by *L. K. Luse*, attorney, and *Thomas Wilson*, of counsel, and oral argument by *Mr. Luse.*

W. F. McNally, for the respondent.

WINSLOW, J. The plaintiff recovered a judgment for personal injuries received by him under the following circumstances: He was employed as a warehouseman by the defendant at its station at New Richmond, and one of his duties was to seal the doors of all freight cars which were loaded at New Richmond, before they left the station. On the day of the accident a car had been loaded with flour at a mill about a quarter of a mile from the freight depot at New Richmond. A freight train came in, and the engine uncoupled from the train and brought this car to the station, preparatory to placing it in the train. While the engine and car were standing still upon the house track for a moment, the plaintiff went between the car and the tender of the engine, and was climbing up to seal the door in the end of the freight car, when the engine was suddenly moved back, and the plaintiff's foot was caught under the wheel of the tender and partly torn off.

Plainly, if his injury was the result of the negligence of any third person, it was the negligence of the engineer or fireman of the engine, both of whom were the plaintiff's fellow-servants. *Ewald v. C. & N. W. R. Co.* 70 Wis. 420. If, therefore, there is any liability on the part of the railway

company, it must be under the terms of ch. 220, Laws of 1893. By this act a railway employee who is engaged in "operating, running, riding upon, or switching" trains or cars may recover for injuries caused by the negligence of another employee in the performance of his duties. That the plaintiff was not at the time of his injury engaged in "operating, running, riding upon, or switching" a car is so plain that argument of the question is unnecessary. Sealing the door of a car, plainly, is not operating or running it. This view is in harmony with the previous decisions of this court construing this statute. *Smith v. C., M. & St. P. R. Co.* 91 Wis. 503; *Ean v. C., M. & St. P. R. Co.* 95 Wis. 69. The consideration of decisions under radically different statutes in other states would not be in any degree helpful. These views are fatal to the recovery, and render the consideration of other questions unnecessary.

By the Court.— Judgment reversed, and cause remanded for a new trial.

KELLER, Respondent, vs. THE TOWN OF GILMAN, Appellant.

96 445
100 282
96 445
104 423
96 445
105 386
105 621
96 445
108 196

May 21 — June 11, 1897.

Appeal: Order granting new trial: Record: Failure to perfect appeal before judgment.

1. An order granting a new trial does not necessarily affect the judgment within the meaning of sec. 3070, R. S., allowing intermediate orders and determinations which involve the merits and necessarily affect the judgment to be reviewed upon appeal, whether excepted to or not, where they appear upon the record. Such an order, and the matter upon which it is founded, does not therefore become a part of the record, and cannot be reviewed on appeal from the judgment rendered on the second trial unless incorporated into the bill of exceptions.
2. A party loses his right to appeal directly from an order granting a new trial by failing to perfect his appeal before judgment is rendered on the verdict given on the second trial, in which both parties participated.

APPEAL from a judgment of the circuit court for Pierce county: A. J. VINJE, Judge. *Affirmed.*

The plaintiff brought an action to recover damages against the defendant town, for injuries she had received while traveling on one of its public highways, and upon trial before a jury the defendant had a verdict in its favor. The plaintiff moved, upon the minutes of the court, for various reasons, to set aside the verdict and for a new trial. The court granted the motion without the imposition of costs, but the record fails to show upon what ground. The defendant did not appeal from the order. Upon a second trial the plaintiff had a verdict and judgment for $150 and costs, from which the defendant appealed. There is no bill of exceptions containing the minutes of the court on either trial, but there was a statement, signed by the trial judge, in the return, showing that a new trial was granted on account of the exclusion of evidence which he subsequently concluded should have been admitted.

W. F. McNally, for the appellant.

For the respondent there was a brief by *A. P. Weld* and *Ray S. Reid*, and oral argument by *Mr. Reid.*

PINNEY, J. The defendant seeks, on this appeal from the final judgment, to obtain a review, under R. S. sec. 3070, of the order setting aside the first verdict and granting a new trial, and a consequent reversal of the judgment rendered on the second trial as erroneous, the effect of which would probably be to restore the first verdict and entitle it to judgment thereon. Under the section referred to, upon an appeal from a judgment, the court "may review any intermediate order or determination of the court below, which involves the merits and *necessarily affects the judgment*, appearing upon the record transmitted or returned from the circuit court, whether the same were excepted to or not; nor shall it be necessary in any case to take any excep-

tion or settle any bill of exceptions, to enable the supreme court to review any alleged error, which would, without a bill of exceptions, appear upon the face of the record." The statement of the trial judge of the ground upon which the new trial was granted, though properly transmitted with the return, is no part of the record upon or in respect to which error may be assigned. The defendant had lost its right to appeal directly from the order granting a new trial, by failing to perfect such appeal before judgment was rendered on the verdict given on the second trial, and in which both parties participated. *Victor Sewing Machine Co. v. Heller*, 41 Wis. 657. The judgment appealed from rests upon the pleadings and the verdict in favor of the plaintiff, and we think that it cannot be said that the order granting a new trial "necessarily affects the judgment" appealed from. It is therefore no part of the record, and not reviewable on appeal from the judgment, unless the order and the matter on which it was founded were made a part of the record by a bill of exceptions. The case of *Donkle v. Milem*, 88 Wis. 33, 37, 38, and cases there cited, is conclusive on the point. It was there held that "mere interlocutory motions and orders, not involving the merits and *necessarily* affecting the judgment appealed from, are no part of the record or judgment roll for the purposes of an appeal from the judgment, unless made so by a bill of exceptions."

The defendant should have settled a bill of exceptions, making such former order, and the minutes of the court upon which it was founded, a part of the record. For the want of such bill, we are unable to notice the points assigned to show that the order granting the new trial was erroneous.

By the Court.—The judgment of the circuit court is affirmed.

96 448
106 311
106 312

BORCHSENIUS, Respondent, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

96 448
59 LRA 234n

May 21 — June 11, 1897.

Surface waters: Artificial accumulation by construction of railroad: Failure to construct culverts: Negligence: Pleading.

1. Where the owner of land permits surface waters to accumulate thereon he must either confine them or transmit them to adjacent lands in such a manner as to cause no material injury thereto: and if they escape through his negligence he is liable for injury occasioned thereby.
2. In an action against a railroad company for an injury to land occasioned by accumulated surface water breaking through its roadbed, mere failure of the company to construct culverts or drains to permit the passage of surface water from the upper to the lower side cannot be imputed as negligence, unless such disposition of the water would have been in substantial accord with its natural flow.
3. Where a railroad company constructs a roadbed which it could foresee would act as a dam to obstruct the passage of surface water, it is its duty to construct it at such a place and in such a manner as to withstand the waters which would accumulate against it in all ordinary storms, so as to guard against all damages, which could be reasonably foreseen, to lower proprietors.
4. A complaint in such a case alleging that plaintiff's damage "was caused solely by the negligent and unskilful manner in which said roadbed was constructed, and by the obstruction of the natural drains occasioned through the negligence and carelessness of said defendant in the construction of said roadbed," is *held* sufficient, as against a general demurrer, to show that defendant had failed in such duty.

APPEAL from an order of the circuit court for St. Croix county: E. B. BUNDY, Circuit Judge. *Affirmed.*

Appeal from an order overruling a demurrer to the complaint. The complaint alleges that the defendant has constructed the roadbed of its railroad along the side of the plaintiff's land at an elevation above the natural surface of the ground of from four to eight feet; that the land on the

north or upper side of its roadbed and right of way is a natural watershed for a large area, from which the waters, in time of rains or melting snows, naturally come down to defendant's roadbed, and, before the construction of the roadbed, passed upon the lands below; that the roadbed formed a dam or reservoir for such surface water, and prevented its passage to the south side of the roadbed, and caused it to accumulate in great quantity on the upper side of the roadbed; that no gutters or other means for carrying off such waters as should accumulate were provided; that during a great storm of rain the defendant's roadbed gave way, opposite the plaintiff's land, and the pent-up waters broke loose and passed over the plaintiff's land, carrying away the top soil and greatly damaging the land; that the washout and damage were caused solely by the negligent and unskilful manner in which the roadbed had been constructed, and by the obstruction which it caused to the natural drainage of the land. The defendant demurred to the complaint. The trial court overruled the demurrer, and the defendant appeals.

For the appellant there was a brief by *L. K. Luse*, attorney, and *Thomas Wilson*, of counsel, and oral argument by *Mr. Luse.*

James A. Frear, for the respondent, to the point that the railroad company was liable for the damage occasioned by the water breaking through its roadbed, cited *Sinai v. L., N. O. & T. R. Co.* 71 Miss. 547; *Galveston, H. & S. A. R. Co. v. Parr*, 8 Tex. Civ. App. 280; *Sentman v. B. & O. R. Co.* 78 Md. 222; *Kansas City, Ft. S. & M. R. Co. v. Cook*, 57 Ark. 387; *Texas & P. R. Co. v. Snyder*, 18 S. W. Rep. 559; *Ill. Cent. R. Co. v. Heisner*, 45 Ill. App. 143; *Bastable v. Syracuse*, 8 Hun, 587; Gould, Waters, § 273; Thomp. Neg. 1; *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb. 526; *Jacobson v. Van Boening*, 48 id. 80; *Kearney v. Themanson*, id. 74; *Fletcher v. Rylands*, L. R. 1 Exch. 265; Cooley, Torts, 570.

NEWMAN, J. Surface water is recognized as a common enemy, which each proprietor may fight off or control as he will or is able, either by retention, diversion, repulsion, or altered transmission; so that no cause of action arises for such interference, even if some injury occurs, causing damage. *Bowlsby v. Speer*, 31 N. J. Law, 351; *Pettigrew v. Evansville*, 25 Wis. 223; *Hoyt v. Hudson*, 27 Wis. 656; *Lessard v. Stram*, 62 Wis. 112; *Wendlandt v. Cavanaugh*, 85 Wis. 256. This general rule is, however, limited by the exclusion from its application of the case of surface water which falls or accumulates on the proprietor's own land. He may repel such water from coming from his neighbor's land to his; but, such water being upon his land, he may not divert it or cause it to flow upon the land of another in unaccustomed volume, to his injury. This limitation of the rule is stated in *Pettigrew v. Evansville, supra*, and *Hoyt v. Hudson, supra.* It is said in *Pettigrew v. Evansville:* "It is the duty of every owner of land, if he wishes to carry off the surface water from his own land, to do so without material injury or detriment to the lands of his neighbors; and, if he cannot, he must suffer the inconvenience arising from its presence, and cannot complain that others refuse to allow it passage over their lands. Such is the sound and wholesome doctrine upon this subject; and although it does not go so far as to require the owner to resort to any artificial means to prevent the surface water from his lands flowing on to the land of another, when such flowing is produced by natural causes, yet it will prevent him from using such means for the purpose of making it flow there whenever the same would be materially injurious to the proprietor thereof." It is recognized that some latitude is given as to the manner in which owners of estates shall improve or change them, as regards surface waters, so that not every slight or immaterial change would afford ground for an action. This limitation of the general rule is stated in *Cairo & V.*

R. Co. v. Stevens, 73 Ind. 278, in these words: "Such waters as fall in rain or snow on his land, or come thereon by surface drainage from or over contiguous lands, he must keep within his boundaries, or permit them to flow off without artificial interference, unless within the limits of his land he can turn them into a natural watercourse."

To cast such accumulated waters purposely upon an adjoining proprietor is a direct injury, for which an action in trespass will lie. To permit them negligently, by means of artificial constructions, to become accumulated and discharged upon him in unusual quantities, to his injury, causing indirect and consequential damages, may render the negligent party liable for the damages caused, in an action on the case for negligence. Having permitted the surface waters to accumulate on its right of way, it then became the defendant's duty to either confine them there, or to transmit them to adjacent lands in such a manner as to cause no material injury to such lands. If they escaped through its negligence, it is liable.

It is not quite clear that the complaint states facts which show that the defendant was negligent in the construction of its roadbed. The negligence more particularly alleged and claimed was the absence of culverts or drains to permit the passage of the water through or under the roadbed from the upper to the lower side. It is not clear that this could be imputed as negligence, because it is not clear that to let surface water through culverts at that place would have been permissible. If that would let the water down upon adjacent proprietors at unaccustomed places and in unusual quantities, to their material injury, it would not be permissible, while if that disposition of the surface water would be in substantial accord with its natural flow it might be permissible. *Johnson v. C., St. P., M. & O. R. Co.* 80 Wis. 641. The complaint fails to state facts which show that the omission of culverts was negligence.

The complaint contains the general allegation that the plaintiff's damage "was caused solely by the negligent and unskilful manner in which said roadbed was constructed, and by the obstruction of the natural drains occasioned through the negligence and carelessness of said defendant in the construction of said roadbed." It was the duty of the defendant to construct its roadbed, which it could foresee would act as a dam to obstruct the passage of surface waters, at such a place and in such a firm and perfect manner as to withstand the waters which would accumulate against it in all ordinary storms, so as to guard against all damages, which could be reasonably foreseen, to lower proprietors. Perhaps this general allegation of the complaint is sufficient, as against a general demurrer, to show that the defendant had failed in this duty, however it might be held as against a motion on the ground of indefiniteness and uncertainty. It is considered that the complaint states a cause of action.

By the Court.—The order of the circuit court is affirmed.

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MORRISON, Executor, Appellant, vs. CITY OF MADISON, Respondent.

May 21—June 11, 1897.

Municipal corporations: Defective cross-walk: Court and jury.

1. The court is not warranted in taking a case from the jury unless the facts are undisputed, and the reasonable inferences therefrom in regard to the ultimate fact at issue are all one way.
2. A cross-walk is not defective as matter of law because an apron from the sidewalk across the gutter is constructed, on a slope of one and three-fourths inches to the foot, without cleats or other devices to prevent slipping.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

On the 29th day of November, 1893, plaintiff's testator, while traveling on foot on the cross-walk from the west to the east side of Park street, a much-used public thoroughfare in the city of Madison, Wisconsin, and when about midway of the apron constructed from the sidewalk on the west side of the street to the macadam portion of such street, slipped, fell, and struck upon his hip, thereby causing to him a serious bodily injury, from the effects of which he subsequently died. This action was brought to recover damages, upon the theory that the cross-walk, at the point where the deceased slipped and fell, was not reasonably safe for public travel, and that such insufficiency was the proximate cause of the injury complained of. The alleged defect consisted of the apron being constructed on a slope of about twenty-two inches in thirteen and one-half feet, and there being no provision made by means of cleats, or sprinkling with sand or ashes, to guard against the liability of pedestrians slipping on the inclined surface of the apron during the season when it was liable to be rendered dangerously slippery by reason of ice formed thereon. The answer put in issue the allegations of the complaint charging defendant with negligence in respect to the cross-walk, and alleged contributory negligence on the part of the deceased. The evidence showed that the cross-walk consisted in part of an apron, so called, reaching from the sidewalk across the gutter to the macadam portion of the street, constructed of good, sound plank so placed as to make a walk thirteen and one-half feet long by five and one-quarter feet wide, with a slope from the sidewalk towards the center of the street of one foot ten and three-quarters inches. It was a new structure, having been finished but a few days prior to the accident. There were no cleats on the planking or other means used to prevent slipping, and no railing to guard against stepping off at the sides where the surface of the walk was raised above the gutter and the sloping sides thereof. At the time of the ac-

cident the cross-walk was covered with a thin coating of ice, which had formed within a few hours by reason of a sudden fall of the temperature during a slight fall of rain and sleet. The jury found specially that the cross-walk where plaintiff was injured was not insufficient or out of repair. Judgment was thereupon rendered in defendant's favor, dismissing the complaint, with costs, and from such judgment plaintiff appealed.

For the appellant there was a brief by *Spooner, Sanborn, Kerr & Spooner*, and oral argument by *A. L. Sanborn.*

John A. Aylward, for the respondent.

MARSHALL, J. The single question presented in this case is, Was the cross-walk, where the deceased was injured, defective as a matter of law? The facts in regard to its construction and condition are all undisputed; yet if there was any room for honest differences of opinion among reasonable men of unbiased minds in respect to the inferences that should be drawn therefrom regarding the fact in issue, then it was for the jury, and not the court, to draw the correct inference. It is only when the facts are undisputed, and the reasonable inferences therefrom in regard to the ultimate fact in issue are all one way, that what is the proper inference is a question of law for the court to answer. *Sabotta v. St. Paul F. & M. Ins. Co.* 54 Wis. 687; *Dahl v. Milwaukee City R. Co.* 62 Wis. 652; *Hill v. Fond du Lac*, 56 Wis. 242; *Orttel v. C., M. & St. P. R. Co.* 89 Wis. 127.

In the light of the foregoing well-established principle, and the numerous adjudications of this court applying it to facts similar to those here presented, and unfavorably to appellant's contention, we must hold and decide that the court properly submitted the question of the sufficiency of the cross-walk to the jury, and that the determination in that regard in defendant's favor is a verity in the case. Keeping in mind, for the purposes of comparison, that the cross-walk

was on a grade of about one and three-quarters inches to the foot; that, as in all the cases to which we will refer, there were no cleats on the walk to guard against danger of travelers slipping thereon; that such grade and absence of cleats were the only defects complained of which, on the evidence, could have had anything to do with the injury to the deceased, the cases cited by respondent's counsel from the records of this court are clearly conclusive in its favor. In *Cook v. Milwaukee*, 27 Wis. 191, a flagstone, lying across a gutter and forming a part of the cross-walk, was on a slant of one inch to the foot, and the sidewalk in connection with the flagstone, for a distance of two feet, was on a slant of three inches to the foot. In *Hill v. Fond du Lac*, 56 Wis. 242, there was a descent in the walk of three inches to the foot for a space of two feet. In *Schroth v. Prescott*, 63 Wis. 652, the slant of the walk was about the same as in this case. In *Whitney v. Milwaukee*, 57 Wis. 639, the slant of the walk was still greater than in the preceding case. In *McMaugh v. Milwaukee*, 32 Wis. 200, the walk was two and a half feet above the surface of the gutter, and descended at the rate of about two inches to the foot. Plaintiff, in attempting to walk on it when it was covered with ice, slipped and was injured. In *Perkins v. Fond du Lac*, 34 Wis. 435, the walk was constructed of plank, and on a grade of about one and three-quarters inches to the foot. Plaintiff was injured by slipping while walking thereon when the walk was covered with ice. In *Grossenbach v. Milwaukee*, 65 Wis. 31, the cross-walk where plaintiff was injured was on a grade of from one to one and a half inches to the foot. In all of these cases this court held that the sufficiency of the walk was a question for the jury. We cannot hold otherwise in this case without going contrary to the established law on the subject.

By the Court.— The judgment of the circuit court is affirmed.

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SCHILLINGER, Administrator, Respondent, vs. TOWN OF VERONA, Appellant.

May 22—June 11, 1897.

Defective highway: Injury to driver of runaway team.

A town is not liable for injuries caused by a defective highway to the driver of a runaway team, where at the time of the accident the horses were more than momentarily beyond control, and their fright had not been caused by any defect in the highway.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

This is an action to recover for personal injuries alleged to have been suffered by reason of a defective highway in the defendant town. The case has been twice before this court upon previous appeals, and will be found in 85 Wis. 589, and in 88 Wis. 317. The circumstances of the accident are quite fully stated in the report of the case upon the first appeal, and it will not be necessary to repeat them here any further than to say that the original plaintiff's claim is that, while driving across a bridge spanning Sugar river in the defendant town, his horses became frightened at a hole in the floor of the bridge, and backed the buggy in which he was riding off the bridge and down an unprotected embankment which formed the north approach to the bridge. The complaint charged the hole in the bridge and the absence of the railing on the embankment to be defects in the highway by reason whereof the plaintiff was injured.

Upon the third trial the jury returned a special verdict whereby they found (1) that the plaintiff's horses were of ordinary gentleness; (2) that the horses did not become frightened at the hole in the floor of the bridge; (3) that said hole was not naturally calculated to frighten horses of ordinary gentleness, and (4) was not one of the direct causes of plaintiff's injury; (5) that the hole had existed for such a

length of time, and under such conditions, that the officers of the town ought to have discovered and repaired it before the accident; (6) that the approach to the north end of the bridge, at the place where the plaintiff's buggy backed off, was in a condition of insufficiency and want of repair; (7) that such insufficiency and want of repair was not a direct cause of plaintiff's being tipped and thrown out of his buggy; (8) that the plaintiff's team became unmanageable before his buggy was backed off the approach; (9) that the said team were more than momentarily uncontrollable before the plaintiff was tipped and thrown out of his buggy; (10) that the town officers had actual notice of the insufficiency and want of repair of the approach before the time of the accident; (11) that such insufficiency and want of repair was one of the direct causes of plaintiff's being injured; (12) that the plaintiff was not guilty of contributory negligence; (13) that his damages were $2,000.

The defendant moved for judgment in the defendant's favor upon the verdict, which was overruled, and afterwards moved to set aside the verdict and for a new trial, which was also overruled, and upon motion judgment was rendered in favor of the plaintiff, from which judgment the defendant appealed.

Pending the hearing on this appeal the original plaintiff died, and the present plaintiff, his administrator, has been substituted as respondent in this action.

For the appellant there was a brief by *Olin & Butler*, attorneys, and *B. W. Jones*, of counsel, and oral argument by *Mr. H. L. Butler* and *Mr. Jones*. They argued, among other things, that the finding that the team were more than momentarily uncontrollable when the plaintiff was thrown out of the buggy was fatal to the plaintiff's right to recover and entitled the defendant to judgment upon the verdict. *Houfe v. Fulton*, 29 Wis. 296; *Jackson v. Bellevieu*, 30 id. 250; *Kel-*

ley v. Fond du Lac, 31 id. 179; *Hawes v. Fox Lake*, 33 id. 438; *Olson v. Chippewa Falls*, 71 id. 558; *Hoyt v. Hudson*, 41 id. 105; *Roberts v. Wis. Tel. Co.* 77 id. 589; *Bishop v. Belle City St. R. Co.* 92 id. 139; *Schillinger v. Verona*, 85 id. 589; *Wright v. Templeton*, 132 Mass. 49; *Higgins v. Boston*, 148 id. 484; *Scannal v. Cambridge*, 163 id. 91; *Cleveland v. Bangor*, 87 Me. 259; *Spaulding v. Winslow*, 74 id. 528; *Aldrich v. Gorham*, 77 id. 287; *Lambeck v. G. R. & I. R. Co.* 106 Mich. 512; *Bleil v. Detroit St. R. Co.* 98 id. 228; *St. Clair Mineral Springs Co. v. St. Clair*, 96 id. 463; *Murphy v. M. C. R. Co.* 65 N. W. Rep. 753; *Beall v. Athens*, 81 Mich. 536; *Kingsley v. Bloomingdale*, 67 N. W. Rep. 333; *Farmers' H. L. C. & R. Co. v. Westlake*, 23 Colo. 26; *Smith v. County Court*, 33 W. Va. 713; *Schaeffer v. Jackson*, 50 Pa. St. 145; *Railway Co. v. Roberts*, 56 Ark. 387; *Teater v. Seattle*, 10 Wash. 327; *Yeaw v. Williams*, 15 R. I. 20; *Brown v. Glasgow*, 57 Mo. 156, 158; 9 Am. & Eng. Ency. of Law, 387.

For the respondent there was a brief by *La Follette, Harper, Roe & Zimmerman*, and oral argument by *G. E. Roe*. They contended, *inter alia*, that where a highway is defective for the ordinary purposes of public travel, and such defect is one of the direct causes of an injury to a traveler on the highway, the town is liable, in the absence of contributory negligence, although another cause of such injury is the more than momentarily uncontrollable condition of the traveler's team. *Ring v. Cohoes*, 77 N. Y. 83; *Ivory v. Deerpark*, 116 id. 476; *Crawfordsville v. Smith*, 79 Ind. 308; *Campbell v. Stillwater*, 32 Minn. 308; *Baldwin v. Greenwood Turnpike Co.* 40 Conn. 238; *Hull v. Kansas City*, 54 Mo. 598; *Winship v. Enfield*, 42 N. H. 202; *Templeton v. Montpelier*, 56 Vt. 328; *Yocum v. Trenton*, 20 Mo. App. 489; *Union St. R. Co. v. Stone*, 54 Kan. 83; *Hey v. Philadelphia*, 81 Pa. St. 44; *Lacon v. Page*, 48 Ill. 499; *Byerly v. Anamosa*, 79 Iowa, 204; *Augusta v. Hudson*, 94 Ga. 135; *Missouri P. R. Co. v.*

Hackett, 54 Kan. 316; *Sherwood v. Hamilton*, 37 U. C. Q. B. 410; Jones, Neg. of Mun. Corp. § 196; Elliott, Roads & Streets, 448, 449; Beach, Contrib. Neg. § 245.

WINSLOW, J. In this case we are clearly of opinion that judgment should have been ordered for the defendant upon the verdict. By the verdict the jury found that the horses were not frightened at the hole in the bridge, but that the horses became unmanageable before the buggy was backed off the approach, and became more than momentarily uncontrollable before the plaintiff was tipped out of the buggy. The backing off from the approach and the tipping over of the buggy were practically simultaneous events, as shown by all the evidence on the subject. The case, then, is this: A gentle horse becomes more than momentarily uncontrollable upon the highway. His fright is not occasioned by any defect in the highway; and while in that condition he comes in contact with a defect in the highway, and his owner and driver suffers an injury. Can there be a recovery for such injury against the town?

There is unquestionably a direct conflict in the decisions on this question. The Massachusetts doctrine is that there can be no recovery under such circumstances. *Higgins v. Boston*, 148 Mass. 484, and cases cited. On the other hand, the New York doctrine seems to be that the town *may* be liable under such circumstances, provided the injury would not have been sustained but for the defect. *Ring v. Cohoes*, 77 N. Y. 83. There are, perhaps, a greater number of courts which follow the New York rule than the Massachusetts rule. See Elliott, Roads & S. 448, 449, and notes; Beach, Contrib. Neg. (2d ed.), § 245. We had supposed that there was no question but that this court had definitely adopted the Massachusetts rule. The intimation to that effect contained in *Houfe v. Fulton*, 29 Wis. 296, was followed by the direct adjudication of the principle in *Jackson v. Bellevieu*,

30 Wis. 250, which case has never been overruled, but has, on the contrary, been cited with approval in a number of cases since that time, the last one being the case of *Bishop v. Belle City St. R. Co.* 92 Wis. 139, where the rule is expressly stated and the authorities cited. It was impliedly, if not expressly, recognized in the opinion of the court upon the first appeal in the present case. 85 Wis. 599. We regard the principle as so firmly fixed in the jurisprudence of the state as not to admit of change, even were we disposed to regard it as in any respect undesirable as an original proposition.

The fact being found, without error, that the horse was in effect a runaway horse at the time of the accident, and that his fright was not occasioned by any defect in the highway, the town was entitled to judgment upon the verdict.

By the Court.— Judgment reversed, and action remanded with directions to enter judgment for the defendant.

Authorities as to the effect of fright of a horse on the right to recover for injuries from a defective highway are collected in a note to *Schaeffer v. Jackson Township* (150 Pa. St. 145), in 18 L. R. A. 100.— REP.

GILLAN, Respondent, vs. THE STATE JOURNAL PRINTING COMPANY, Appellant.

May 22 — June 11, 1897.

Newspaper libel: Presumption of damage.

1. A newspaper article predicting a fresh attack upon the state university at a coming meeting of the state teachers' association, and stating that plaintiff (a teacher, institute conductor, manager of a teachers' agency, and proprietor of an educational journal) and one H. (a normal school president) "are said to have had their heads together," and that plaintiff is known to have "repeatedly written high school teachers asking them to launch attacks upon the

university," does not convey a charge of moral turpitude or have relation to plaintiff in any of his occupations, and is not therefore libelous *per se*.

2. A complaint in such a case, alleging, among other things, that the article was published during the progress of a newspaper controversy relative to the state university in which charges had been made against its management and the character of the work done, engendering hostility on the part of its friends towards the authors of the attack and all who encouraged the same, and just prior to a meeting of the state teachers' association at which the relations of the high schools with the university was to be a topic for discussion, is *held* insufficient to raise a presumption of injury, in the absence of an allegation of special damages.

APPEAL from an order of the circuit court for Dane county: GEO. CLEMENTSON, Judge. *Reversed.*

The action is for damages for the publication of an alleged libel. The alleged libel is in the following words:

"FRESH ATTACK PREDICTED.

"The Chicago Times-Herald says that somebody will spring a fresh attack at the state teachers' convention in Milwaukee next week. Circulars have been issued to high school teachers, asking these questions:

"'How many pupils have entered the university from your school during the past three years?'

"'How many have entered other institutions?'

"'Do you consider that the shaping of the course of study by the university interferes with the practical working of your school?'

"An editor of a *little* educational paper in Milwaukee, named *Gillan*, and Normal President Harvey, who is the most politically inclined of all the educators of the state, *are said to have had their heads together. It is known that Gillan has repeatedly written high school teachers asking them to launch attacks upon the university.*"

This was an article published in the defendant's newspaper. The complaint alleged the publication of the article,

and, by way of inducement, the following facts as summarized in plaintiff's brief:

"That the University of Wisconsin is a state institution, and is supported by the public as the chief educational institution of the state. That it is annually attended by twelve hundred and more students. That of these a large number are preparing for and intend to become teachers. That the number of its graduates and its former students, now residents of Wisconsin, is very large, many of whom are principals, teachers, superintendents, and members of school boards.

"That the number of high schools in Wisconsin is two hundred and twenty-five, and that they employ as teachers a large number of graduates and former students of the state university. That there is a close, friendly, and mutually helpful relation existing between the university and these schools.

"That plaintiff has been for several years an institute conductor and a prominent teacher in Wisconsin, and, in addition, is the editor and owner of the Western Teacher, a monthly educational journal, devoted to advancing the interests of education and strengthening the system of public schools, particularly in Wisconsin; and that plaintiff is the manager and owner of a teachers' agency, organized and conducted for the purpose of securing schools for applicants desiring to teach, for which services a commission is charged, which annually amounts to a large sum of money and constitutes one of plaintiff's principal sources of income. That plaintiff's success in his profession and in his business depends upon the confidence of students, teachers, superintendents, school boards, and the public in his recommendations, his personal integrity, his professional reputation, and his strict impartiality; and that plaintiff depends largely for patronage for his educational journal and teachers' agency upon the students and graduates of the state university.

"That, for some weeks prior to the date of the alleged publication, a bitter controversy was waged in the newspapers of the state relative to the management of the university, and the work and habits of its students. That an attack was made upon it, in which grave charges of misconduct on the part of the regents and the president of the university, and as to the work of the students, were made; and that these charges were of a nature calculated to injure the university and impair the confidence of the public in its management. Thus hostile feelings were engendered on the part of the friends of the university against the authors of said attack, and against all others who encouraged the attack, and they were denounced as enemies of the university. Their motives were impugned, and their integrity questioned.

"That a meeting of the state teachers was called to be held a few days after the publication of the libelous article in question, at which the question of the influence of the university upon high schools was announced as a topic for discussion, and at which more than a thousand representative teachers were present.

"That the defendant published the alleged libelous article of and concerning the plaintiff, with intent to injure plaintiff in his standing as a citizen and professional man, and in his business, and to destroy the confidence of students, teachers, and school boards in his impartiality as manager of a teachers' agency, and to make it appear that plaintiff was guilty of improper and dishonorable practices in the conduct of his business relations with the high school teachers, secretly and stealthily creating hostility among them against the state university."

There was very ample innuendo to point out the meaning of the words complained of. There is a general allegation of damages, but no special damages are alleged. There was a general demurrer to the complaint, which was overruled.

From the order overruling the demurrer the defendant appeals.

For the appellant there was a brief by *Spooner, Sanborn & Spooner*, attorneys, and *Charles Philip Spooner*, of counsel, and oral argument by *A. L. Sanborn* and *Charles Philip Spooner*.

James A. Sheridan, for the respondent.

NEWMAN, J. In every legal cause of action for tort are two elements,—the injury, and the damages which flow from it. The injury is the unlawful act; the damages are the scale or measure of the recovery. Both elements must concur to give a right of action. The injury alone, without damage, does not give it; nor damages alone, without the injury. So, in order that it shall state a cause of action, the complaint must state facts which show, not only an injurious publication, but that the plaintiff has suffered damages from it. The law infers damages from the publication of language such as necessarily or presumably occasions damage. It is said, also, to infer damages from such language as "directly tends to the prejudice of any one in his office, profession, or trade." *Gottbehuet v. Hubachek*, 36 Wis. 515; *Singer v. Bender*, 64 Wis. 169. Such language is actionable without allegation or proof of damages. And a complaint which sufficiently alleges the publication of such language need not allege damages, for such will be presumed. But, in other cases, special damages, such as do not necessarily or probably flow from the publication of the language complained of, are essential to be alleged. Without such allegation no cause of action is stated.

In order that language published concerning one in a special character or relation shall be actionable *per se*, and without the allegation of special damages, it "must touch him" in that particular character or relation. It must be published of him in his official or business character. Town-

shend, Slander & L. (4th ed.), § 190; Odgers, Libel & S. (1st Am. ed.), 65; *Kinney v. Nash*, 3 N. Y. 177; *Purdy v. Rochester Printing Co.* 96 N. Y. 372. But when the publication conveys only a general imputation upon the plaintiff's character, which would be similarly injurious to any one of whom it might have been published, it is not actionable, unless applied by the publication itself to the profession or occupation of the plaintiff. *Sanderson v. Caldwell*, 45 N. Y. 398; *Moore v. Francis*, 121 N. Y. 199. So, it has been held not actionable to say of a justice of the peace, "Squire Oakley is a damned rogue;" or of a physician that he has committed adultery; or of the keeper of a restaurant, "You are an infernal rogue and swindler;" or of an attorney, "He has defrauded his creditors, and has been horsewhipped off the course at Doncaster." This point is amply illustrated by citations in the text books above referred to, and does not need further illustration.

The question then seems to be resolved into this: Did the publication complained of touch the plaintiff in his profession or occupation? While it does directly charge some things which the plaintiff might well resent and wish to deny, it certainly contains no words of defamation, nor any which reflect upon the occupation of the plaintiff or the manner in which it is conducted. It does not even mention his teachers' agency or newspaper, except by way of description of his person. There are no words which touch him in his occupation. It is alleged that the plaintiff and President Harvey "have had their heads together," and that the plaintiff "has repeatedly written high school teachers asking them to launch attacks upon the university." It is not quite clear what was intended by these imputations. They are equivocal. But it is clear that they do not convey a charge of moral turpitude, and that they have no relation to the plaintiff in his occupation, either as a teacher, or as a conductor of institutes, or as the conductor of a teachers'

agency, or as the manager of an educational newspaper. They seem to imply criticism on conduct which has no necessary or natural connection with either. The reputed conduct would be equally reprehensible in any other. It impeaches neither his skill nor ability nor his conduct in his occupation. It relates altogether to matters outside of his business.

It is impossible to say that there is any very persuasive presumption that this publication either has worked or will work the plaintiff an injury. That seems to depend, in large measure, on which was the stronger or more popular side of the controversy mentioned in the complaint. If the plaintiff's actions met the approbation of the more popular side, *non constat* that the publication would not inure to his advantage, both financially and socially. The complaint is silent upon this point. Such damages as might or might not result are too remote and contingent to afford a basis for a satisfactory presumption.

It is considered that the publication will not support an action, unless special damages are proved. None having been alleged, the complaint does not state a cause of action.

By the Court.— The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

ROSSITER, Respondent, vs. THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Appellant.

May 22 — June 11, 1897.

Appealable order: Stay of proceedings: "Injunction."

A stay of proceedings is not an injunction within the meaning of sec. 2773, R. S. (abolishing the writ of injunction, and substituting therefor "a command to refrain from a particular act"). An

order denying such a stay, therefore, is not appealable under the provision of ch. 212, Laws of 1895, allowing an appeal from an order which "grants, refuses, continues, or dissolves an injunction."

APPEAL from an order of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Appeal dismissed.*

This was an action to recover the amount of a policy of life insurance, in which the plaintiff had judgment for the amount claimed, which was reversed by this court, with $227.75 costs, October 22, 1895, and the case was remanded for a new trial. 91 Wis. 121–130. The plaintiff paid the costs of the clerk of this court, $14.75, and, without paying the residue, procured the case to be remitted to the trial court, September 9, 1896, and noticed the cause for trial, and it was placed on the trial calendar accordingly. The defendant, upon affidavit of these facts, and that the remainder of the costs had not been paid as prescribed by S. & B. Ann. Stats. sec. 3072*a*, moved the trial court to strike the cause from the calendar of causes for trial, on account of such nonpayment of costs, and that all proceedings on the part of the plaintiff be stayed until said costs were paid. The court entered an order denying said motion, from which the defendant appealed.

For the appellant there was a brief by *Geo. W. & H. S. Bird*, and oral argument by *Geo. W. Bird.*

For the respondent the cause was submitted on the brief of *H. W. Chynoweth.*

PINNEY, J. In order to sustain its appeal, the appellant is obliged to contend that the order in question is appealable under subd. 3, sec. 3069, R. S., as amended by ch. 212, Laws of 1895, which provides for an appeal "when an order grants, *refuses*, continues, or dissolves an injunction." The argument is, in brief, that as an injunction is defined "as a judicial process, whereby a party is required to do a particular

thing, or to refrain from doing a particular thing, according to the exigency of the writ" (2 Story, Eq. Jur. § 861), and as by statute the writ of injunction is abolished and now "is a command to refrain from a particular act" (R. S. sec. 2773), therefore a stay of proceedings, which is defined to be the act "of stopping or arresting a judicial proceeding by order of the court or judge" (Burrill, Law Dict.), is, in substance, an injunction, and the conclusion is thus reached that an order refusing a stay of proceedings in an action is appealable as an order *refusing* an injunction. We have not been referred to any case or work on practice that sanctions such a loose and apparently unwarranted construction of the statute regulating appeals.

An injunction by order, which is a substitute for the judicial writ, operates upon the conduct of the parties and their attorneys, in respect to matters outside of those occurring in the ordinary progress of the action. A stay of proceedings operates in relation to something within the usual course of judicial proceedings, and which the court, by its authority over the parties and their attorneys, can regulate and control without resort to the extraordinary writ of injunction. The fact that the injunction is now by order, instead of writ, does not extend its scope or operation. The language of the statute allowing an appeal, when an order "grants, *refuses*, modifies, or dissolves an injunction," must be aptly restrained to the particular subject matter, and confined to cases of orders which in fact and in effect are within the proper scope of the writ of injunction, as formerly used and regarded as a judicial process. The change in form was not designed to extend or enlarge the scope of the statute in respect to appeals, so as to bring within the special language quoted common orders granting or refusing a stay of proceedings in the ordinary course of the progress of the cause. The use of the language of the statute regulating appeals as to such orders can have only the

same general significance the same language had before the order was substituted for the writ. The provision in respect to appeals in such cases deals only with matters which were formerly within the use and scope of injunction by judicial writ. The order, in the present instance, is one refusing an ordinary stay of proceedings in the common course of the action, and is not appealable.

By the Court.— The appeal is dismissed.

THE SENOUR MANUFACTURING COMPANY, Respondent, vs. CLARKE, Assignee, Appellant.

May 22 — June 11, 1897.

Attachment: Corporations: Intent to defraud creditors: Apparent power of officers.

1. In attachment proceedings against a corporation, the evidence — showing, among other things, that substantially all the stock was owned by the president, who practically exercised the whole power of the corporation; that he kept no systematic books of account and possessed no accurate knowledge of its financial condition; that he conducted his private business and that of the corporation together; that he applied funds of the corporation to his private use when he knew or ought to have known it to be insolvent; that he incurred a large amount of indebtedness in the name of the corporation, and treated its assets as individual property — is *held* to sustain a finding that the corporation had assigned, conveyed, or disposed of its property, or was about to do so, with intent to defraud creditors.
2. Where the president of a corporation is apparently clothed with full power to conduct its business and control its affairs, the public may rely upon such apparent authority, and the corporation will be bound to the same extent as though his acts were specially authorized by a duly-recorded vote of the board of directors, especially where such officer is the owner of substantially all the stock and the only person pecuniarily interested in the corporation.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Plaintiff sued out a writ of attachment against the property of the defendant, The Sheasby & Smith Wall Paper & Paint Co., upon the alleged grounds — First, that defendant had or was about to assign, convey, dispose of, or conceal its property with intent to defraud its creditors; and, second, that it fraudulently contracted the debt and incurred the obligation in respect to which the action was brought. Defendant's property was seized pursuant to the commands of the writ, and thereafter it made an assignment for the benefit of creditors. Subsequent to such assignment the assignee, pursuant to sec. 1693*a*, S. & B. Ann. Stats., appeared, in the name of the assignor, and traversed the affidavit upon which the writ of attachment was issued. On the trial of the issues thus formed the circuit court sustained the attachment on the first ground alleged in the affidavit, to wit, that defendant had assigned, conveyed, and disposed of, and was about to assign, convey, and dispose of, its property with intent to defraud its creditors. Judgment was thereafter rendered in plaintiff's favor, and the assignee appealed from that portion thereof sustaining the attachment.

For the appellant there was a brief by *Erdall & Swansen*, and oral argument by *John L. Erdall* and *Sam. T. Swansen.*

For the respondent there was a brief by *Lewis, Briggs & Dudgeon*, and oral argument by *H. M. Lewis* and *M. S. Dudgeon.*

MARSHALL, J. No question of law is presented on this appeal worthy of any extended discussion. The finding of fact that the allegation of the affidavit for the writ of attachment that the defendant had assigned, conveyed, and disposed of, and was about to assign, convey, and dispose of, its property with intent to defraud its creditors, is challenged

as not supported by the evidence, which raises the main question for consideration. Such question must be considered and determined in the light of the familiar rule that findings of fact made by the trial court cannot be disturbed unless contrary to the clear preponderance of the evidence. *Earlywine v. Lindley*, 66 Wis. 494; *Bruce v. Miller*, 72 Wis. 404; *Catura v. Kleiner*, 95 Wis. 378. It is believed that failure on the part of attorneys to bear in mind and appreciate the force of this rule, which has become firmly fixed in our jurisprudence, results in many useless appeals, and much unnecessary expense to litigants. The trial judge has an opportunity of seeing and hearing the witnesses, observing their manner while testifying, and the benefit of many aids of a persuasive character calculated to materially assist in drawing correct inferences in regard to the facts, that cannot be preserved for the benefit of the appellate court; hence the justice of the rule that such inferences will not be displaced by others drawn by such appellate court unless the former are against the clear preponderance of the evidence is apparent, and why it should be firmly adhered to is also manifest.

The evidence here is to the effect that for a considerable length of time before the suing out of the writ of attachment, and during the time the indebtedness to plaintiff accrued, the Sheasby & Smith Wall Paper & Paint Company was a corporation; that substantially all the stock was owned by F. C. Sheasby, who was its president; that he conducted its business, managed its affairs, and practically exercised the whole power of the corporation; that no systematic books of account were kept; that Sheasby did not possess any accurate knowledge of its financial situation; that he ran his private business and the corporation business together, so that the assets of one could not be readily known from the other; that he took funds of the corporation and applied the same to his private use, while he knew or ought to have known that the corporation was insolvent;

and that while he incurred indebtedness to a large amount in the name of, and on account of, the corporation, he treated its assets as individual property, regardless of the rights of creditors to have the same applied in payment of their claims. The effect of such conduct on the part of the president of the corporation being naturally to defraud its creditors, we are unable to say that the trial judge did not draw the correct inference therefrom, in finding that such was the president's intent, and that he had both disposed of, and was about to dispose of, property of the corporation to effect it.

It is said by appellant's counsel that the acts of Sheasby cannot be charged to the corporation, as corporate acts. Such contention cannot be sustained. This court has repeatedly held that, where the president of a corporation is apparently clothed with full power to conduct its business and control its affairs, the public may rely upon his apparent authority so to do, and the corporation will be bound to the same extent as though such officer were specially authorized by a duly-recorded vote of the board of directors. In a case like this, where the officer whose conduct is called in question is shown to be the owner of substantially all the stock, and the only one pecuniarily interested in the corporation, the rule stated is peculiarly applicable, and should be firmly adhered to. *Ford v. Hill*, 92 Wis. 188; *McElroy v. Minn. Percheron Horse Co.*, *ante*, p. 317.

By the Court.— That part of the judgment appealed from is affirmed.

WHEELER, Respondent, vs. CLARKE, Assignee, Appellant.

May 22 — June 11, 1897.

Senour Mfg. Co. v. Clarke, ante, p. 469, followed.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Erdall & Swansen,* and oral argument by *John L. Erdall* and *Sam. T. Swansen.*

For the respondent there was a brief by *Lewis, Briggs & Dudgeon,* and oral argument by *H. M. Lewis* and *M. S. Dudgeon.*

MARSHALL, J. This appeal involves the same question presented in *Senour Mfg. Co. v. Clarke, ante,* p. 469, and is ruled by the decision in that case.

By the Court.— That part of the judgment of the circuit court appealed from is affirmed.

PELTON, Appellant, vs. POWELL, Respondent.

May 24 — June 11, 1897.

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Counterclaim in action for tort: Assault and battery.

Under secs. 2655, 2656, R. S. (providing that a defendant may plead as a counterclaim "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action"), the defendant in a civil action for assault and battery may set up as a counterclaim a cause of action for a prior assault committed upon him by the plaintiff, in defending himself from which the defendant committed the assault for which the action was brought.

APPEAL from an order of the circuit court for Sauk county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The facts are stated in the opinion.

For the appellant the cause was submitted on the brief of *G. Stevens.*

For the respondent there was a brief by *Olin & Butler*, and oral argument by *W. W. Allen.* To the point that a counterclaim for tort, in a tort action, may be set up provided it answers the other requirements of the statute, they cited Phillips, Code Pl. § 251; Bliss, Code Pl. § 372; *Slone v. Slone*, 2 Met. (Ky.), 339; *Heigle v. Willis*, 50 Hun, 588; *Glenn & H. Mfg. Co. v. Hall*, 61 N. Y. 226; *Carpenter v. Manhattan L. Ins. Co.* 22 Hun, 49; *S. C.* 93 N. Y. 552; *Chamboret v. Cagney*, 2 Sweeney, 378; *Brown v. Buckingham*, 21 How. Pr. 190; *Xenia Branch State Bank v. Lee*, 2 Bosw. 694; *Grange v. Gilbert*, 44 Hun, 9; *Bitting v. Thaxton*, 72 N. C. 541; *Walsh v. Hall*, 66 id. 233; *Tinsley v. Tinsley*, 15 B. Mon. 454; *Branch v. Chappell*, 119 N. C. 81; *Barholt v. Wright*, 45 Ohio St. 177, 181; *Lee v. Eure*, 93 N. C. 5, 9; *Green v. Parsons*, 14 N. Y. St. Rep. 97; *Ainsworth v. Bowen*, 9 Wis. 348; *Gilbert v. Loberg*, 86 id. 661; *McArthur v. Green Bay & M. Canal Co.* 34 id. 139.

CASSODAY, C. J. This action was brought to recover damages for assault and battery alleged to have been committed upon the plaintiff by the defendant, June 15, 1896, and the complaint simply sets forth that cause of action and demands judgment for the damages claimed. After alleging that, just before the assault mentioned in the complaint, the plaintiff assaulted the defendant, the answer, by way of counterclaim, alleges, in effect, that June 15, 1896, the plaintiff, with force and arms, unlawfully and maliciously made an assault upon the defendant, and did beat, bruise, pound, and ill-treat him, so as to cause him to be sick, sore, and lame, and inflicted great suffering upon him, to his damage in the sum of $1,000, and that during the affray the defendant, in the necessary defense of his own person, struck

the plaintiff, but used no more force than was necessary to protect himself from continued violence of the plaintiff, and that the blow so struck by the defendant in self-defense is the same assault and battery complained of in the complaint. To such counterclaim the plaintiff demurred upon the ground and for the reason that the same was not pleadable as a counterclaim in the action. From the order overruling such demurrer the plaintiff brings this appeal.

Eliminating from our statutes what is inapplicable to the case at bar, and they provide, in effect, that an answer may contain "a statement of any new matter constituting a . . . counterclaim . . . in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of . . . a cause of action arising out of the contract *or transaction* set forth in the complaint, as the foundation of the plaintiff's claim, *or connected with the subject of the action.*" R. S. secs. 2655, 2656. Counsel contends that the word "transaction" should be construed to apply only to such transactions "as are in the nature of contracts," if not strictly contracts. But the manifest purpose of the statute was to allow parties to the same suit to settle in such suit, as far as convenient and practicable, all controversies arising out of the same contract *or transaction* set forth in the complaint, *or connected with the subject of the action.* Such is, in effect, the construction which this court has repeatedly put upon the statutes. *Vilas v. Mason*, 25 Wis. 310; *McArthur v. Green Bay & M. Canal Co.* 34 Wis. 139; *Gilbert v. Loberg*, 86 Wis. 661; *Collins v. Morrison*, 91 Wis. 324. The provisions of the statutes quoted manifestly do not limit counterclaims to causes of action arising out of contracts or transactions in the nature of contracts. If additional authorities are wanted in support of this proposition, they can be found in the brief of the learned counsel for the defendant. We must hold that the counterclaim was properly pleaded in this action.

By the Court.— The order of the circuit court is affirmed.

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STRONG and others, Appellants, vs. GORDON and others, Respondents.

May 24—June 11, 1897.

Creditors' action: Trusts: Construction of statute.

1. G. purchased land with P.'s money, took title in his own name with P.'s consent, and gave P. written declarations that P. owned the land and that he held the title in trust for him, but such declarations were not recorded, and most of them were not entitled to record. Plaintiffs extended credit to G., knowing that he had title to the land but not relying on his ownership thereof. Neither G. nor P. represented that G. owned the lands, nor did P. know that G. was contracting debts. G. conveyed the lands to P., who throughout the entire transaction acted in good faith and without intent to defraud plaintiff or any other person. Subsequently plaintiffs obtained judgment against G. *Held*, that the land could not be subjected to the lien of the judgment by a creditors' action.
2. Sec. 2090, R. S. (providing that when an express trust is not created by the conveyance to the trustees "such conveyance shall be deemed absolute as against subsequent creditors not having notice of the trust," etc.), applies only to the express trusts authorized by sec. 2081, S. & B. Ann. Stats., not to mere passive or dry trusts.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This is an action in the nature of a creditors' bill, brought by the plaintiffs, who are judgment creditors of the defendant Gordon, to subject about 260 acres of farm lands, conveyed by Gordon to the defendants *Peck*, September 8, 1890, to the lien of the plaintiffs' judgment, on the ground that the plaintiffs gave credit to Gordon, while he held the title to said lands, upon the faith of his apparent ownership thereof.

The action was tried before the court, and the court found, in effect: (1) That the plaintiffs obtained their several judgments against defendant Gordon in September, 1890, and that executions were thereafter issued thereon and returned unsatisfied. (2) That between March, 1882, and December, 1888, the defendant Gordon purchased of various persons

certain parcels of real estate upon the shores of Lake Koshkonong, in Jefferson county, amounting in all to about 262 acres, and took the legal title thereto in his own name, and placed the deeds upon record; but that, in truth and in fact, he purchased such lands for the use and the benefit of the defendants *Peck*, who furnished and paid the purchase price thereof, and that Gordon had no beneficial interest in said lands, but held the legal title thereof for the use and benefit of the defendants *Peck*, who paid the entire purchase price of said lands, amounting, in all, to about the sum of $12,000. (3) That from 1882 to 1890 the defendants *Peck* also furnished and paid to the defendant Gordon about the sum of $20,000, in addition to said $12,000, a large portion of which was used by the defendant Gordon for improvements upon said lands, and that Gordon never repaid to said *Pecks* any part of said advances. (4) That the plaintiffs had no knowledge of the interest that the *Pecks* had in said lands when they extended credit to Gordon, but that they knew at that time that the legal title to said lands was in said Gordon, and believed him pecuniarily responsible for the debts he contracted. (5) That said Gordon made no representations to said plaintiffs in respect to the ownership of said lands, nor did the plaintiffs rely upon his apparent ownership of said lands in extending him credit. (6) That the defendants *Peck* did not know that Gordon was contracting debts or incurring obligations to the plaintiffs, or either of them, or to other persons, and that they never represented or acted so as to lead any one to believe that Gordon owned said lands, but, on the contrary, claimed the lands as their own. (7) That in all dealings with reference to said lands the defendants *Peck* acted in good faith, and from legal and honest motives, and that they did not permit the title to be taken by Gordon for any wrongful or dishonest purpose, or with intent to defraud the plaintiffs or any other persons. (8) That upon the purchase of said various parcels of land

by Gordon the said Gordon made, executed, and delivered various declarations of trust, covering said lands, declaring, in effect, that he held the title thereto for the benefit of the defendants *Peck*, but that none of said declarations of trust were recorded in the office of the register of deeds, excepting one, which was recorded on the 24th day of July, 1890, but was not witnessed or acknowledged so as to entitle it to be recorded. (9) That on the 8th day of September, 1890, the said Gordon executed and delivered quitclaim deeds to all of said lands to the defendants *Peck*, which deeds were recorded in the proper office on the 10th day of September, 1890. (10) That in taking the said quitclaim deeds the said defendants *Peck* acted in good faith, and that said deeds were made merely for the purpose of placing the legal title in the persons who actually owned the said lands and had paid the consideration therefor, and without intent to defraud any persons, and that said deeds were made and delivered upon a valuable and sufficient consideration. (11) That the plaintiffs commenced attachment actions against the defendant Gordon in July, 1890, but did not cause any real estate described in the complaint herein to be attached. (12) That this action was not commenced until the 5th day of December, 1894, and that more than four years had elapsed after the return of the last execution before the commencement of this action. (13) That the defendant Gordon became insolvent in the spring of 1890, and left the state, and has never returned.

As a conclusion of law the court found that the plaintiffs had no lien or claim against the lands named in the complaint. From a judgment dismissing the complaint the plaintiffs appeal.

L. B. Caswell, for the appellants, contended, *inter alia*, that the *Pecks* were estopped from asserting their interests in the land as prior to the interests of the plaintiff. *Hopkins v. Joyce*, 78 Wis. 443; *Besson v. Eveland*, 26 N. J. Eq. 468,

472; *Hews v. Kenney*, 43 Neb. 815; *Simon v. Openheimer*, 20 Fed. Rep. 553; *Rumsey v. Town*, id. 558; *Crook v. Stuart*, 2 McCrary, 13; *Argall v. Seymour*, 4 id. 55; *Hirsch v. Norton*, 115 Ind. 341; *Trenton Banking Co. v. Duncan*, 86 N. Y. 222; *Pierce v. Hower*, 142 Ind. 626; *Standard Paper Co. v. Guenther*, 67 Wis. 101; *Sanger v. Guenther*, 73 id. 354; *Crippen v. Fletcher*, 56 Mich. 389; *Hildreth v. Sands*, 2 Johns. Ch. 35; *Blennerhassett v. Sherman*, 105 U. S. 118; *Bank of U. S. v. Housman*, 6 Paige, 526.

For the respondents *Peck* there was a brief by *Fethers, Jeffris, Fifield & Mouat* and *Aldrich, Reed, Foster & Allen*, and oral argument by *M. G. Jeffris*.

WINSLOW, J. It is vigorously contended that some of the vital findings of fact made by the court are not justified by the evidence, but examination of the case convinces us that the contention cannot prevail.

The facts, in brief, are that Gordon bought 260 acres of land with the money of the defendants *Peck*, and took title in his own name with the consent of the *Pecks*. As he purchased the various parcels of land, Gordon gave to the *Pecks* written declarations, stating, in effect, that the *Pecks* had advanced the money to pay for the land, and owned the same, and that he (Gordon) held the title in trust only for them, and subject to their direction. These declarations were not placed on record, and in fact most of them were not executed so as to be entitled to record. The plaintiffs extended credit to Gordon, knowing that he had title to the lands, but not relying upon his ownership of the lands. Neither Gordon nor the *Pecks* represented that Gordon owned the lands, nor did the *Pecks* know that Gordon was contracting debts. Prior to the plaintiffs' judgments, Gordon conveyed the lands to the *Pecks*, because they had paid the entire consideration therefor, and the acts of the *Pecks*

throughout the entire transaction were in good faith, and without intent to defraud the plaintiffs or any other person.

Upon these facts the defendants were entitled to judgment under the decisions of this court. Had Gordon represented to the plaintiffs that he owned the lands, and obtained credit thereby, the plaintiffs dealing with him on the faith of his representation and apparent ownership, the *Pecks* would probably be estopped from asserting any interest in the land until the plaintiffs had been paid. *Hopkins v. Joyce*, 78 Wis. 443. Such, however, was not the case. Neither Gordon nor the *Pecks* made any representations as to Gordon's ownership of the lands, nor did the plaintiffs give Gordon credit relying upon his apparent ownership. Before the plaintiffs obtained judgments, Gordon in good faith conveyed the lands to the *Pecks*, who had paid for them, and were entitled in good conscience to the title. Thus, though the trusts were probably void, being mere passive or dry trusts not authorized by the statute, they were fully executed before the rights of any third persons had intervened, and hence will be protected. *Karr v. Washburn*, 56 Wis. 303; *Begole v. Hazzard*, 81 Wis. 274.

The plaintiffs invoke the aid of sec. 2090, R. S., which provides as follows: "When an express trust is created, but is not contained or declared in the conveyance to the trustees, such conveyance shall be deemed absolute as against the subsequent creditors of the trustees, not having notice of the trust, and as against purchasers from such trustees, without notice, and for a valuable consideration." The express trust here referred to must be one of the express trusts authorized by sec. 2081, R. S., as amended by ch. 290, Laws of 1883, as these are the only valid express trusts now existing with reference to real property under our laws. It has been held, also, that the trust referred to in this section must be created by an instrument in writing executed

as the statute requires. *Pavey v. American Ins. Co.* 56 Wis. 221. As we have seen, the trusts attempted to be declared by Mr. Gordon in the various declarations were mere passive or dry trusts, and not express trusts; hence the section has no application to the present case. *Davis v. Graves*, 29 Barb. 480.

By the Court.— Judgment affirmed.

MINNESOTA THRESHER MANUFACTURING COMPANY, Respondent, vs. WOLFRAM, Appellant.

May 24 — June 11, 1897.

Agency: Transaction outside of contract: Sale: Rescission: Evidence: Court and jury.

1. In an action on a promissory note given to the manufacturer of threshing machines by one of its agents, who had been employed under a contract making him personally liable for all machines sold unless settled for by cash or notes before delivery, in payment for a second-hand machine which he had sold on his own responsibility and which had been returned to him because failing to work as represented, the question whether the transaction amounted to a sale of the machine to the defendant entirely outside the contract of agency, thus enabling him to insist upon an express warranty, is *held*, upon the evidence, to have been for the jury.
2. Evidence in such case that, after some correspondence in respect to the return of the machine and rescission, the transaction was adjusted by the defendant with plaintiff's general agent, in pursuance of which the tools and extras which had been furnished with the machine were returned and credited to defendant, and plaintiff sent him an invoice of the outfit, by which it was consigned to him for sale on commission and charged to him at the regular agent's price,— rendered the question of rescission also for the jury.

APPEAL from a judgment of the circuit court for Outagamie county: CHAS. M. WEBB, Judge. *Reversed.*

This action was brought to recover upon a promissory note given by the defendant to the plaintiff, August 2, 1893, for $255. The defense was that the note was given as the purchase price of a separator, a machine for threshing grain, manufactured and furnished by the plaintiff to the defendant, under a representation that it was fit and proper to do the work for which it was designed, and that the defendant purchased it, relying on such representation; that the machine was not as represented, and not fit and proper to, and would not properly and well, do the work for which it was intended, and was not capable of threshing well everything a farmer has to thresh, as wheat, etc., and was altogether unsuitable and useless; that the defendant notified the plaintiff thereof, and requested it to take it away, or to put it in working order or condition, but that it neglected so to do, whereupon the defendant, by direction of the plaintiff, stored said machine at the place designated by it, where it has ever since remained, subject to the order and control of the plaintiff. Except as stated, the answer denied all allegations of the complaint.

At the trial before a jury, the defendant produced evidence that the note was given for the separator machine he bought of the plaintiff, relying upon a circular issued by the plaintiff, which the defendant had at the time, as to the capacity and character of the machine, which was put in evidence. The defendant gave evidence tending to show that the machine was thoroughly tried in August, 1893, and that it would not work properly; that they could not save nor clean grain with it, etc.; that it did not perform or work as represented; that the defendant, at the time of the purchase, was an agent, acting for the plaintiff, and had had the machine in his possession as such since the spring of 1893; that it was represented to him to be as good as a new one, and would do as good work as stated in the circular; that Blaker was the plaintiff's general agent, and one Dean, another agent of the

plaintiff, under Blaker, of whom he bought it, was assisting Blaker; that the defendant was buying the machine to sell.

It appeared that the plaintiff had first sold the machine to Bailey, who used it for ten or twelve days in the fall of 1892; that the number of the machine was 12,080, and the plaintiff had taken it back; that August 12, 1893, the defendant wrote to the plaintiff's agent Dean, of whom he purchased the machine, being the machine 12,080, that they could not make it work, "and so I am in a bad fix with it. I don't know what I shall do about it. . . . Let me know what I shall do about it. If parties are good, I could make them keep it all right, but I find I can't hold them. Give me your best advice." A letter was written from the defendant to the plaintiff about the machine, the substance of which was that he could not make use of the machine, "because it did not work well, and it is here subject to your order. Please inform me what to do with it." The defendant afterwards wrote to the plaintiff, asking if it would be "all right if I load Bailey separator on car, and ship it to Stillwater," and offering to load it and the engine free of charge, and "send you all extras you sent to complete it." The plaintiff answered: "As regards the Bailey separator, which you purchased of our Mr. Blaker, we are not prepared to make you any reply. . . . These matters are in his hands, and if he expects you to stand by your bargain and pay for the machine, he is unquestionably justified in doing so. . . . We shall certainly not receive either the engine or separator should you ship them back without our consent." At the time the defendant purchased, the plaintiff furnished him "free repairs to complete the Bailey separator, two belts, three sieves, one tool box, and the tools that are usually furnished with a new separator."

The defendant testified that he had a settlement in his agency account with plaintiff in the fall of 1893, with Blaker, then the plaintiff's agent, and that the plaintiff took

back the said tools and extras, and in 1894 the plaintiff's agent McNair directed him to ship them to the plaintiff; that he received from the plaintiff, about its date, September 8, 1893, or shortly thereafter, a bill charging him with said engine and separator No. 12,080, at $350, as "consigned for sale on commission." He testified that $350 was the regular invoice price of these separators charged up to agents of the company, and was the retail selling price for which they were to sell them, and the agent had his commission, twenty per cent., with ten per cent. off for cash; that this bill was sent to him after the plaintiff knew of his refusal to take the machine, and after his letters to them, and he received it after he knew that they did not want to accept the separator; that the separator was in Farrell's field until late in the fall, and, acting as the plaintiff's agent, he got the machine under cover on his own premises, and that it was there yet, subject to the plaintiff's order; that at the time Blaker took back the tools, etc., he understood the situation of things, and defendant had talked it over with him; and that he received credit for the tools, etc.; and that he was credited with repairs he had made on the separator in the repair-settlement account produced in evidence.

The plaintiff put in evidence the defendant's agency contract with the plaintiff, providing, in substance, among other things, that the defendant, as plaintiff's agent, should not deliver any machine or other property to any customer or other person, or permit the use thereof, until settled for by cash or notes, and, if he should do so, he should become personally liable for it, and, on demand, should account to the plaintiff for the price thereof, with interest, etc., and should "*waive* all claims under the warranty, and protect the plaintiff from all such claims on any machines, or parts thereof, sold or delivered without settlement, as therein required." Also, a letter written by the defendant to the

plaintiff's agent Dean, in regard to the sale to him of the machine, in which he says: "I have to let you know that I have sold separator for $275, to be paid this fall, and I will give my note payable until December 1st. Party will get it to-morrow. You make out *how much you want from me*, and I will send you note for same. I have sold it at my own risk, and so you make out your statement, and send it to me. If I do not hear anything to the contrary till to-morrow, I will let it go out. If you can come down here at once, we can fix it up." Also, a letter from the defendant to the plaintiff, dated August 21, 1893, in which he writes: "I had bad luck with the Bailey separator. I sold it out so I thought it was all right, and gave my own note for it, but, as it came to the point, the party could not make it work; so they left it in the field, and bought another separator. So, I offer to bring the separator back, and load it on the cars here at Appleton, free of charge, if he would return my note of $255, and he say he would not do it, so he can go to trouble. [Defendant explained that he referred to the agent Blaker.] If you think you can make better by it, and so I think would be best, you would not be out anything, and it would help me out of soup."

The court directed a verdict for the plaintiff, for the amount of the note, upon which judgment was given against the defendant, and from which he appealed.

Humphrey Pierce, for the appellant.

For the respondent there was a brief by *Brown & Buffington*, and oral argument by *F. V. Brown*.

PINNEY, J. 1. The evidence strongly tends to show that the transaction in respect to the machine No. 12,080, between the plaintiff and defendant, was wholly outside of the agency contract between the parties, and was, in fact, a sale by the plaintiff of this machine to the defendant, so that he might insist upon the warranty which the evidence tends to

show was made at the time the machine was sold to him by plaintiff's agent Dean, and the consequences of the alleged breach thereof. Whether it was a transaction within or wholly outside of the agency contract should have been submitted to the jury under proper instructions from the court. The circuit court appears to have held that by the provisions of the agency contract, contained in the statement of the case, the defendant was barred, as a matter of law, from insisting upon the breach of warranty asserted in the answer. This view of the case is, we think, erroneous.

2. The defendant, in his answer, insisted upon the right to rescind the sale, for the reason that the machine did not answer the terms of the warranty, and that he had notified the plaintiff thereof since the discovery, and within a reasonable time, offering to return the machine. *Warder v. Fisher*, 48 Wis. 338; *Paige v. McMillan*, 41 Wis. 337. The defendant averred in his answer that, by direction of the plaintiff, he had stored the machine in a designated place, where it was, and ever since had been, subject to the plaintiff's control. There was evidence tending to support the defense that the contract of sale had been rescinded. It was to the effect that, after some correspondence in respect to the return of the machine and rescission, the transaction was adjusted by the defendant, with the plaintiff's general agent, so that the tools and extras were returned and credited by the plaintiff to the defendant to the amount of $19.47, and by the plaintiff sending the defendant, under date of September 8, 1893, an invoice of the engine and separator No. 12,080, by which it was consigned to the defendant for sale on commission, and charged to him at $350, the regular price at which such machines were charged up to agents for sale. According to the evidence, the plaintiff not only took and received back the tools and extras furnished with the machine upon its sale, but practically took back the machine, by making the defendant's actual possession of it the pos-

session of the plaintiff, as its bailee, for its sale on commission; so that the plaintiff received back all that it had parted with under the sale, and thus seems to have assented to the defendant's claim of rescission. The defendant, under the evidence, was entitled to have his claim of defense in this respect submitted to the jury. The circuit court erred in withdrawing it from the consideration of the jury, and in directing a verdict for the plaintiff.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

POWERS, Respondent, vs. SPAULDING, Appellant.

96 487
107 130
107 526

May 24 — June 11, 1897.

Deeds: Construction: Parol evidence: Estoppel in pais.

1. Under a deed expressing a consideration of $2,500, and containing a covenant that the premises are free from all incumbrances whatever, except the cost of street improvements in front of the same, "which costs or assessments therefor the second party agrees to pay," the grantee is clearly liable for the entire cost of the improvement in front of the premises, and parol evidence that at the time of the bargain it was represented that such cost would not exceed a certain sum, is inadmissible.
2. Where the grantor in such a case had been compelled to pay the entire cost of the improvement, errors in his estimate of the cost of the same will not estop him from recovering from the grantee more than such estimate.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

The defendant bought from the plaintiff a house and lot in the city of Appleton, for the price of $2,500. This was to be paid, $2,300 at time of delivery of deed, and the balance by paying the costs of certain street improvements, then

in progress, in front of the premises, for which the plaintiff had contracted and would become liable, the amount whereof was then unknown,—such sum as the plaintiff should become liable to pay. The expressed consideration of the deed was $2,500; but among the covenants contained in the deed was this provision: "That the same are free and clear from all incumbrances whatever, except the costs of improvements on Lawe street, on the front of said premises, which costs or assessments therefor the second party agrees to pay, *to the same extent as the first party has agreed so to do.*" The words italicized appeared to have been written in different ink from that in which the body of the deed had been written. The plaintiff became liable to pay $146.34. The defendant refused to pay it. The plaintiff paid it, and brings this action to recover the amount so paid from the defendant. The defense was that, at the time of the bargain, it was represented to the defendant that the costs of the improvement which he might be called upon to pay under the contract would not exceed $35 to $40, and it is claimed that the plaintiff is estopped to claim more. No fraud is alleged. Evidence to prove such representation was excluded. Evidence offered to show that the words above in italics had been written into the deed without defendant's knowledge, and after the execution of the deed, was excluded. A verdict for the plaintiff, for the amount of her claim, was directed. From a judgment on the verdict the defendant appeals.

Humphrey Pierce, for the appellant.

Orlando E. Clark, for the respondent.

NEWMAN, J. The deed evidently was intended to express the entire agreement of the parties on the subject to which the action relates. It is entirely clear by the deed itself that the defendant was to pay the whole cost of the improvement in front of the premises he purchased. This is clear without considering the disputed words. Such words did not change

the meaning of the stipulation, nor add anything to it. The conversations which preceded and attended the execution of the deed are incompetent to change the stipulations contained in the deed itself. They were mere estimates of the probable cost of the improvements, and could not be the basis of an estoppel, and, in the absence of fraud, are of no effect whatever.

By the Court.—The judgment of the circuit court is affirmed.

NEU, Appellant, vs. VOEGE, Respondent.

May 24–June 11, 1897.

96 489
108 409

Taxation: Assessment of lots in recorded plat: Construction of statute: Mandamus.

1. Sec. 1045, R. S. (requiring the assessor to enter upon the assessment roll in regular order as to lots, blocks, etc., a correct description of each parcel of real estate in the assessment district, and providing that where land has been surveyed and platted and the plat thereof duly recorded "the assessor shall designate the several lots and subdivisions of such platted ground as they are fixed and designated by such plat"), is mandatory, and compliance therewith may be enforced by *mandamus*.
2. The right of a person prejudiced by a noncompliance with said provisions of sec. 1045, R. S., to resort to *mandamus* is not affected by sec. 1048 (providing that when contiguous lots owned by the same person are assessed together as one parcel in violation of sec. 1045 such assessment shall not be invalid on that ground).
3. The owner of a large number of tax certificates, each covering but one lot in a recorded plat, has sufficient interest in the premises to entitle him to a writ of *mandamus* to compel the assessor to list the lots separately in compliance with sec. 1045, R. S.
4. Although the granting or refusing of a writ of *mandamus* is somewhat discretionary, when it appears that the application is made to enforce a clear legal right; that the duty to be performed is plain and positive; that substantial damage will follow its nonperformance; and that there is no other adequate remedy, no laches chargeable to the applicant, and no special reason which renders a resort to the remedy inequitable, it is an abuse of discretion to refuse the writ.

APPEAL from an order of the circuit court for Forest county: JOHN GOODLAND, Circuit Judge. *Reversed.*

In the town of Pelican Lake, since prior to 1894, there has existed a duly-recorded plat covering a tract of land in such town, subdividing the same into lots and blocks, as provided by law. For the year 1894 the lots in such plat were separately assessed for taxation, pursuant to sec. 1045, R. S. Such proceedings were thereafter had that several of such lots were separately sold for delinquent taxes returned thereon, and plaintiff became the owner of the tax-sale certificates issued on such sales. In 1895 the assessor assessed the lots included in such plat in half blocks of eighteen or nineteen lots, so that, with few exceptions, each lot upon which plaintiff had a certificate was assessed with a large number of other lots. In 1896 the defendant was the assessor of the aforesaid town, and, against plaintiff's protest, he threatened to assess the lots in such plat in blocks of eighteen or twenty lots each, as they were assessed the previous year, and refused to otherwise assess any of the lots in such plat. Plaintiff, by petition setting up the aforesaid facts, commenced this proceeding to compel the assessment of the lots separately, pursuant to sec. 1045, R. S. Such proceedings were had upon such petition and affidavits supporting the same that an alternative writ of *mandamus* was issued, commanding the defendant to assess the lots in such plat separately, or to show cause to the contrary on the return day of the writ. On such return day the defendant demurred to the petition, upon the ground that it failed to state facts sufficient to authorize the alternative writ of *mandamus.* The demurrer was sustained, and the proceedings quashed, and, from the order accordingly entered, plaintiff appealed.

The cause was submitted for the appellant on the brief of *Samuel Shaw*, and for the respondent on that of *G. F. Sanborn.*

MARSHALL, J. The question presented on this appeal is, Do the facts alleged in the petition for the writ of *mandamus* show that the assessor was required by law to assess the lots in Fair Haven Park separately, and that the appellant had such an interest in the performance of that duty as to entitle him to such writ to compel such performance? There is no contention but that such facts were essential to the maintenance of the *mandamus* proceedings by appellant, and that, if the petition sufficiently alleges their existence, the demurrer thereto and motion to quash the alternative writ were improperly sustained.

Sec. 1045, R. S., relating to the assessment of lots and blocks in legally platted grounds, provides as follows: "The assessor shall enter upon the assessment roll, . . . in regular order as to lots and blocks, . . . a correct and pertinent description of each parcel of real property in the assessment district not exempt from taxation, and the number of acres in each tract containing more than one acre. When two or more lots or tracts owned by the same person are deemed by the assessor so improved or occupied with buildings as to be practically incapable of separate valuation, they may be entered as one parcel. Whenever any tract, parcel or lot of land shall have been surveyed and platted, and a plat thereof recorded according to law, the assessor shall designate the several lots and subdivisions of such platted ground as they are fixed and designated by such plat." This language is mandatory, and its meaning unmistakable. The duty of the assessor, under the statute, to assess lots in legally platted lands separately, subject to the one exception therein mentioned, is too plain to be open to any discussion whatever. From the petition and affidavits presented therewith, the contents of which we do not deem it necessary to incumber this opinion by stating, it sufficiently appears that the assessor's refusal to assess the lots in question separately was not placed upon the ground that they were within the exception named.

Sec. 1045, R. S., is not affected by the provisions of sec. 1048, R. S., to the effect that when contiguous lots owned by the same person are assessed together as one parcel, in violation of sec. 1045, R. S., such assessment shall not be invalid on that ground. That is in the nature of a curative provision. It operates merely to prevent the public from being prejudiced in the collection of its revenues, by reason of the failure of the assessor to obey the commands of sec. 1045, R. S., when no substantial injury can accrue to the individual owner of property from such failure.

So the conclusion is reached that at the time the appellant requested the assessor to assess the lots in Fair Haven Park separately, and at the time of the commencement of this proceeding, it was the plain duty of the assessor to so make such assessment, and upon his refusal so to do, there being no specific legal remedy for the appellant, other than *mandamus*, to protect his interests if he had any in the lots, his right to resort to it is clear.

It remains to be seen whether the petition shows sufficient interest of appellant in the performance by the assessor of his legal duty to assess the lots in question separately to sustain the proceedings in question. We think that must be answered in the affirmative. The appellant was the owner of a large number of tax-sale certificates on lots in the plat. Each of such certificates covered but one lot, and carried with it an interest therein sufficient to entitle appellant to redeem the lot from subsequent tax sales. In case of such subsequent sale, prior to the ripening of his certificate interest into a title by tax deed, the only way in which he could effectually protect such interest was to become the owner of the certificate issued on such subsequent sale; hence the necessity that the lots in which he was interested should be assessed separately is obvious. To be sure, the granting or refusing of a writ of *mandamus* is somewhat discretionary, but when the application therefor is made by a person to

enforce a clear legal right; the duty sought to be enforced is positive and plain; the applicant for the writ shows that he will be substantially damaged by nonperformance of such duty; and there is no other adequate specific legal remedy for the threatened injury, and no laches on the part of such applicant, and no special reasons exist rendering a resort on his part to the remedy, under the circumstances, inequitable, to refuse to issue the writ constitutes an abuse of judicial discretion. *State ex rel. G. B. & M. R. Co. v. Jennings*, 48 Wis. 549; *State ex rel. Lord v. Washington Co.* 2 Pin. 552; *State ex rel. Continental Ins. Co. v. Doyle*, 40 Wis. 220; Merrill, Mandamus, §§ 62–69.

Applying the foregoing to this case, the appellant was clearly entitled to the alternative writ of *mandamus*, and, in the absence of any issue being taken on the facts alleged in the petition, a peremptory writ should have been framed and issued to protect his interests in respect to the assessment of the lots upon which he held tax-sale certificates.

By the Court.—The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.

HAND, Respondent, vs. AGEN, Appellant.

May 24—June 11, 1897.

96 493
107 96

Contracts: Architects: Compensation: Instructions to jury: Immaterial errors.

1. In an action to recover a balance alleged to be due for architect's services, the plaintiff claimed that he first prepared plans, etc., for a two-story building for defendant, under an agreement that he was to receive for his work, including superintendence, four per cent. of the contract price, but that the building was never constructed; and that subsequently at defendant's request he prepared plans, etc., for a three-story building, and began the superintendence of the same, but was discharged before the work had been

completed. Undisputed testimony showed that the value of an architect's services in preparing plans, etc., where his entire compensation had been fixed at four per cent., was two and one-half per cent. of the contract price of the building. *Held*, that the two sets of plans were properly regarded as applying to two different buildings, and that the plaintiff might recover two and one-half per cent. of the contract price of each.

2. Confusion in the statements of the trial judge in his charge to the jury concerning the measure of damages will not work a reversal, where the verdict clearly shows that the jury were not misled thereby.

3. Instructions admonishing the jury that they should not come to too positive a conclusion until they had discussed the matter, one with another: and that they should revolve the matters in their minds until 9 o'clock the next morning, but not become set on it until they had heard the discussion from the brethren in the jury room, which they would find perhaps more valuable than any other discussion they had heard,—do not constitute material error.

APPEAL from a judgment of the superior court of Douglas county: CHAS. SMITH, Judge. *Affirmed.*

The cause was submitted for the appellant on separate briefs by *Butler & Grace* and *L. S. Butler*, and for the respondent on the brief of *Manwaring & Cooke.*

CASSODAY, C. J. The plaintiff brought this action against the defendant to recover the balance due for his services as an architect upon two alleged causes of action. The first cause of action so alleged is to the effect that July 1, 1892, the plaintiff entered into an oral agreement with the defendant to furnish plans, drawings, and specifications for a two-story building to be erected by the defendant, and to superintend the construction of the same, for the agreed compensation of four per centum on the lowest bid therefor, which was $12,600; that, after receiving such plans and bids, the defendant did not erect the building, nor proceed further towards the erection thereof; that such plans, drawings, and specifications, without superintendence, were reasonably worth, and worth by the ordinary and current prices paid

for such services, and proportionately under the contract, the sum of two and one-half per centum upon the lowest bid so received, to wit, $315; and that the defendant had paid to the plaintiff thereon $250, August 10, 1892, leaving a balance due and unpaid of $65.

The second cause of action so alleged is to the effect that July 20, 1892, the defendant instructed the plaintiff to prepare and submit to him plans, drawings, and specifications for a three-story building to be erected by him, which the plaintiff did, to the satisfaction of the defendant, who thereupon advertised for bids on the same; that the contract for the erection of such building, according to such plans, drawings, and specifications, was let by the defendant for the sum of $16,500, exclusive of plumbing; that the plumbing was let for $500, making a total of $17,000; that the defendant then requested the plaintiff to superintend the erection of said building, agreeing thereby to pay him a reasonable price for his services when the building should be completed under his superintendence; that the plaintiff superintended the construction of the building as an architect should do until August 31, 1892, at which time the foundation of the building was nearly completed, under the plaintiff's supervision, when the defendant discharged the plaintiff, without legal or reasonable justification or excuse therefor; that such services of the plaintiff, so performed at the request of the defendant, were reasonably worth, and worth by the ordinary and current prices paid for such services, and the defendant agreed to pay therefor, the sum of four per centum of the contract price as stated, to wit, $680; and that the defendant had never paid the same, nor any part thereof. The complaint further demands judgment against the defendant for the $65, with interest from July 20, 1892, and $680, with interest from August 31, 1892, and costs.

The answer to the respective causes of action consists of admissions, denials, and counter allegations, and claims that

the services alleged in the first cause of action were only worth the $250 which was paid, and that, by reason of certain mistakes and negligence of the plaintiff in performing the services alleged in the second cause of action, the defendant was damaged to the amount of $2,500, which is set forth by way of counterclaim. In replying to such counterclaim, the plaintiff admits there were three clerical mistakes in the specifications, which cost $51.50 to rectify, and asks to have that amount deducted from the amount claimed in his complaint, and then denies all other alleged damages. At the close of the trial, the jury returned a verdict in favor of the plaintiff, and assessed his damages at $421.72. From the judgment entered thereon the defendant brings this appeal.

Error is assigned because the court charged the jury as follows: "Now you are instructed that if plaintiff's testimony is substantially true, and that he was employed to prepare plans and specifications for a two-story building, with no understanding that a three-story building might be substituted without pay for the first plans, he is entitled to two and one-half per cent. on $12,600 for the preparation of the first plans and specifications, and to four per cent. on $17,000, the construction price of the three-story building, provided he was discharged without just cause, subject, however, to any counterclaim you may find defendant has established for damages for mistake in plans and specifications. If you find plaintiff was properly discharged, he would in such case be entitled to two and one-half per cent. on $17,000; that is, pay for the plans and specifications." This portion of the charge was to guide the jury in case they found that the plaintiff had proved the causes of action alleged in his complaint, and had been discharged without just cause, subject, however, to any counterclaim for damages which they might find the defendant had established. Such portion of the charge appears to have been justified by the undisputed expert evidence as to the ordinary charge of an architect for preparing

plans and specifications, without superintendence; and this, as we understand, is substantially conceded by counsel for the defendant. The claim seems to be, however, that such evidence should only apply where there is but one set of plans and specifications prepared and used, or expected to be used, for the same building, but "does not apply where changes are made in the plans of the building, either before or during its construction, even when it may involve the preparation of entirely new plans." Under the pleadings and the testimony, we do not think that such evidence can be so restricted. There seems to have been no connection nor relationship between the plans and specifications for the two-story building, which the defendant never constructed, and the plans and specifications of the three-story building, which he did construct, unless it be that the latter was located at the same place where the defendant had intended to locate the former. We think the trial court properly treated the two sets of plans and specifications, respectively, as applying entirely to different buildings. There does not appear to be any evidence that the plans and specifications not used lessened the work upon or the value of the plans and specifications which were used. The court charged the jury that, "of course, here it appears that plaintiff did enter upon and do some work in the way of supervision, but there has been no testimony here to show what that amount of supervision was worth; so we have to discard that." This took from the jury the question as to how much, if anything, the plaintiff was to recover for his services in supervising the work.

Error is assigned because the court charged the jury that "he [the defendant] further claims and has introduced testimony tending to prove that plaintiff proved inattentive or inefficient in superintending the work. If he was not reasonably attentive or efficient, it was competent for defendant to discharge him, in which case plaintiff would be entitled to

seven-tenths of $350." This is followed in the charge by an explanation which counsel claim "established for the jury" two "diverse ratios," which "must have created confusion" in their minds. Assuming such to have been the tendency of the explanation, yet the amount of the verdict clearly shows that the jury were not misled by it.

Error is assigned because the court admonished the jury not to come to too positive a conclusion until they had discussed the matter, one with the other; that they should revolve the matter in their minds between then and 9 o'clock the next morning, but not become set on it until they had heard the discussion from the brethren in the jury room, which they would find perhaps more valuable than any other discussion they had heard. Under the repeated rulings of this court we must hold that these expressions of the trial court do not constitute reversible error. *Giese v. Schultz*, 69 Wis. 521; *Odette v. State*, 90 Wis. 263; *Jackson v. State*, 91 Wis. 267.

The facts in issue were determined by the jury. We find no reversible error in the record.

By the Court.—The judgment of the superior court of Douglas county is affirmed.

MILLER, Appellant, vs. DONAHUE, Respondent.

96 498
103 399

May 24—June 11, 1897.

Tax titles: Liability of land to taxation: Mistake in patent: Cancellation by executive department: Evidence: Tenants in common.

1. A. purchased for cash from the United States a quarter section of land. The duplicate certificate of entry delivered to him described the land as the S. W. ¼ of a certain section, but the remainder of the entry papers and the patent were issued for the S. E. ¼ of the same section. The original application was lost. A. caused the duplicate certificate to be recorded, and subsequently conveyed

the S. W. ¼ to a third person. The patent was received at the local land office for delivery, but has since been lost or destroyed. The S. E. ¼ was sold for taxes, and title based on the tax deeds became vested in plaintiff. Twenty-seven years after the entry A. claimed to discover that a mistake had been made in the records of the land office whereby the S. E. ¼ had been patented to him instead of the S. W. ¼, and he thereupon made an *ex parte* application to the land department, without notice to the owner of the tax title, to have it rectified, which was granted. The S. W. ¼ having, in the meantime, been patented to other parties, A. reconveyed the S. E. ¼ to the United States, and his entry money was returned and patent canceled. The defendant thereafter entered the S. E. ¼ as a homestead and took possession of the same. Plaintiff brought ejectment against him. A. died before the commencement of the action, and his testimony was not obtained. *Held:*

(1) That upon issuance of the patent to A. the entire title to the S. E. ¼ passed to him, so as to render the land subject to taxation by the state.

(2) That the action of the land department in attempting to cancel A.'s patent was unauthorized and void as to those claiming title under the tax sale.

(3) That the record of such proceedings was inadmissible to show that a mistake in A.'s entry in fact occurred.

(4) That the recording of the duplicate certificate by A., and the execution and delivery by him of a warranty deed of the S. W. ¼, were of themselves insufficient to establish such mistake.

2. Land was sold for the taxes of 1866 and 1868 to the county, and deeds therefor were issued to W. & P. and W. respectively, as its assignees, but it did not appear that W. was a co-tenant with P. in the ownership of the first certificate at the time the second was assigned to him, or that he was then liable, legally or equitably, for the taxes on which the second certificate was based. *Held*, that W.'s deed was not invalid because P. was his co-tenant under the first deed.

[WINSLOW, J., dissents, being of the opinion that the title to the S. E. ¼ remained in the United States, and hence that it was never taxable.]

APPEAL from a judgment of the circuit court for Chippewa county: R. D. MARSHALL, Circuit Judge. *Reversed.*

This is an action of ejectment, to recover the *S. E.* ¼ of section 7, township 29, range 5, in the county of Chippewa.

The answer is a general denial. The cause was tried by the court, a jury having been waived. The evidence is almost entirely documentary.

The plaintiff put in evidence two tax deeds, namely, one from Chippewa county to Francis W. Woodward and Henry C. Putnam, dated January 12, 1870, upon the sale of said lands for taxes May 8, 1866, which deed was duly acknowledged and recorded in Chippewa county, January 13, 1870, and another tax deed for the same premises, from Chippewa county to Francis W. Woodward, dated May 24, 1872, upon the sale of said premises for taxes May 12, 1868, duly acknowledged and recorded May 28, 1872, and deeds of conveyance whereby the title of the said grantee, Woodward, in said tax deeds, became and was vested in the plaintiff, September 5, 1873. He also put in evidence a certificate of the register of the Eau Claire land office, showing that said lands were entered by Hiram S. Allen, January 6, 1854, together with a copy of the patent, certified to by the recorder of the general land office, from the United States to said Allen, for said lands, dated December 15, 1854, in the usual form. Across the face of the patent were written the following words: "Canceled by the commissioner's letter 'M,' dated January 30, 1883, to the R. & R., at Eau Claire, Wisconsin. S. W. Clark, Recorder;" and there was a large cross over the date of the patent.

The defendant offered in evidence a certified copy of the tract book of the land office at Eau Claire, showing the entry of the land in question by Hiram S. Allen, January 6, 1854, and the cancellation of this entry upon reconveyance to the United States, as shown by said commissioner's letter F, dated January 24, 1883, and showing a homstead entry of the same lands by the defendant May 15, 1894. Defendant offered in evidence the duplicate certificate of entry by Hiram S. Allen of the *S. W.* ¼ of the same section, dated January 6, 1854, which had been recorded in the office of the reg-

ister of deeds for Chippewa county, August 18, 1864. It was claimed by the defendant that, by mistake of the officers of the land office, the entry papers, other than the duplicate receipt issued to Allen, described and were issued for the *S. E.* ¼ of said section, for which said patent had issued as aforesaid.

It does not appear that the patent was ever delivered to Allen, or that he knew of the alleged mistake until about the year 1881, when he applied for a return of the purchase money paid on his said cash entry. What was done thereupon appears from the following letter of the commissioner of the general land office of January 24, 1883, to the register and receiver of the land office at Eau Claire, Wisconsin:

"Gentlemen: Referring to my letter F of the 22nd of November, 1881, advising you that action was suspended upon the application of Hiram S. Allen for return of purchase money paid on his cash entry No. 769. . . . . The facts in this case are that January 26, 1854, duplicate cash receipt No. 769 was issued to said Hiram S. Allen, for the *southwest* quarter of section 7, township 29 north, of range 5 west, Wisconsin, while the remainder of the entry papers were issued for the *southeast* quarter of said section. The original application being lost or destroyed, it is now impossible to determine thereby the tract applied for; but Mr. Allen asserts that he applied for, and intended to enter, the *southwest* quarter; and, not being aware of any error being made, he sold and transferred said *southwest* quarter, and the Chippewa Lumber & Boom Company now holds title to the same, based on his duplicate receipt, and he desires the money paid for said land to be repaid to his assigns, the said company. The *southeast* quarter was patented to said Hiram S. Allen, December 15, 1854, and transmitted to the local office August 9, 1855, and the receipt of same at said office was acknowledged September 5, 1865. June 10, 1880, the register at La Crosse reported that the said patent was not

on file in said office. Mr. Allen swears he has never received the patent, and it appears to have been lost or destroyed. The *southwest* quarter of said section was selected by the Wisconsin (now the Chicago, St. Paul, and Minneapolis) Railroad Company, as the indemnity lands, under the act of May 5, 1864, and patented August 24, 1872. Mr. Allen first applied to surrender his claim to the *southeast* quarter, and have his entry amended to embrace the *southwest* quarter; and by letter F, of July 24, 1881, you were directed to submit the facts to the railroad company, and request them to reconvey said *southwest* quarter to the United States, and accept patent for the *southeast* quarter in lieu of same; but as shown by letter of the 22nd of July, 1881, the company declined to accede to this method of adjustment, and, as it is now beyond the power of this office to perfect Mr. Allen's title to the *southwest* quarter, the tract purchased by him, the reconveyance by him of the *southeast* quarter to the United States is accepted, and his entry thereof is this day canceled upon the files and records of this office. You will make the proper notes upon your records with reference to this letter. The repayment of the purchase money will form the subject of another communication. Advise the parties in interest.

"Respectfully,

"N. C. McFarland,

"Commissioner."

The certificate of entry returned to the general land office was for the *S. E.* ¼ of said section; and a certified copy thereof, with a note indorsed thereon as follows: "To R. & R., Eau Claire, Wisconsin: Land conveyed to the United States, and entry canceled; patent lost or destroyed, and surrender of same for cancellation waived in this case. [Signed] Bell, Div. F.,"—is contained in the record. The entry money paid by Allen was returned.

The finding of the court below was substantially in accordance with these facts, and, as a matter of law, that said

Allen did not enter, or acquire any title to, the land in question, which would subject the same to taxation; and judgment thereupon was given for the defendant, from which the plaintiff appealed.

For the appellant there was a brief by *Jenkins & Jenkins*, and oral argument by *John J. Jenkins*.

For the respondent there was a brief by *Wickham & Farr*, and oral argument by *James Wickham*.

PINNEY, J. When the plaintiff had put in evidence the two tax deeds, with proper conveyances to himself, he had made out a *prima facie* title to the premises, upon which he could recover, unless the defendant succeeded in showing that the lands were not taxable at the time the taxes were levied, for the nonpayment of which they were so sold and conveyed.

The defendant's contention is that, by mistake, all the entry papers described Allen's entry as made for the *S. E.* ¼, when it is claimed that he applied in fact for the *S. W.* ¼ of the section, except that the duplicate certificate of the entry delivered to him was for the *S. W.* ¼. The certificate of entry forwarded to the general land office was for the *S. E.* ¼, and a patent was issued to him accordingly, and recorded by the recorder of the general land office December 15, 1854. It appears to have been forwarded to the local land office for delivery, but has since been lost or destroyed. Beyond all question, the patent vested the entire title to the land in Allen. The three-years statute of limitations on the tax deeds had run, as against his title, as early as May 29, 1875. It is claimed that Allen did not discover the mistake until December, 1881, more than twenty-seven years after the date of the patent; and on the 24th of January, 1883, upon an *ex parte* application, without any notice to the holder of the adverse title under the tax deeds, Allen obtained cancellation of the patent, and a return of his money, upon the

grounds stated in the letter of the commissioner of the general land office, it appearing that the *S. W.* ¼ of the section had in the meantime been otherwise disposed of. The act of the executive department in thus attempting to cancel the patent was, we think, unauthorized and void, and that neither the patent nor the title which it conveyed was thereby in any way affected or impaired. The patent was issued in a case within the scope of the authority of the land department, and there was nothing upon file or of record to show that any mistake had occurred.

In *Moore v. Robbins*, 96 U. S. 530–532, it was held that "a patent for public land, when issued by the land department, acting within the scope of its authority, and delivered to and accepted by the grantee, passes the legal title to the land. All control of the executive department of the government thereafter ceases." The court, by Mr. Justice MILLER, further says: "With the title passes away all authority or control of the executive department over the lands, and over the title which it has conveyed. . . . If fraud, mistake, error, or wrong has been done, the courts of justice are as open to the United States to sue for the cancellation of the deed, or for a reconveyance of the land, as to individuals; and; if the government is the party injured, this is the proper course." In *U. S. v. Stone*, 2 Wall. 525, the court said: "A patent is the highest evidence of title, and is conclusive, as against the government and all claiming under junior patents or title, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy." In the subsequent case of *U. S. v. Schurz*, 102 U. S. 378, it was held that, when a patent for a part of the public lands has been regularly signed, sealed, countersigned, and duly recorded, the patentee has a perfect right to the possession of it; that the power of the land department over the proceedings to acquire title to the public land ceases when the

last official act necessary to transfer the title is performed. "In such case the title to the land conveyed passes, by matter of record, to the grantee, and the *delivery* which is required when the deed is made by a private individual is not necessary to give effect to the granting clause of the instrument." Pages 396 and 397.

In that case the status and effect of an undelivered patent, and its effect on the title to the lands, were carefully considered. It was contended that the patent in that case, which had been signed, sealed, and countersigned, and recorded, and then sent to the register of the land office for delivery, had *never been delivered, and had always remained under the control* of the officers of the land department, was ineffectual for want of delivery, and "that this execution of the patent concluded nothing, and the authority of the secretary and the commissioner of the general land office to deal with the whole subject, including the relator's right to the land, remained unaffected by the patent," as seemed to be inferable from the case of *Moore v. Robbins*, 96 U. S. 530; and *Bell v. Hearne*, 19 How. 252, and other cases, were much relied on by the defendant to show that the whole matter remained *sub judice*, so to speak, in the land department, with power to vacate the entry and cancel the patent. 102 U. S. 388–390, 395, 396. But these contentions, there sharply presented, were wholly overthrown by the decision in *U. S. v. Schurz, supra*, and have ever since been so considered. The court further says: "From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases. It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer has been performed; or, so to speak, in technical language, the legal title has passed from the govern-

ment, and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title deeds destroys his title. . . . The acts of congress provide for the recording of all patents for land in one office, and in books kept for that purpose. An officer, called the Recorder, is appointed to make and to keep these records. He is required to record every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction — the legally prescribed act which completes what Blackstone calls 'title by record;' and when this is done, the grantee is invested with title. . . . When all that we have mentioned has been consciously and purposely done by each officer engaged in it, and where these officers have been acting within the scope of their duties, the legal title to the land passes to the grantee, and with it the right to the possession of the patent. No further authority to consider the patentee's case remains in the land office. No right to consider whether *he ought in equity, or on new information*, to have the title or to receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner."

The case of *Bell v. Hearne*, 19 How. 252–262, was one where the error in the Christian name of the patentee was corrected, from James to John, and the mistake was shown by the record, and the court said of it: "The power exercised in this case is a power to correct a clerical mistake, the existence of which is *shown plainly by the record*, and is a necessary power in the administration of every department." *Marsh v. Nichols, Shepard & Co.* 128 U. S. 614. And the case is clearly distinguishable from the present, where the record does not show any mistake, and where the action of the department subverts and cancels a patent absolutely.

"If such a power exists [as was asked by Mr. Justice MILLER in *Moore v. Robbins*, 96 U. S. 534], when does it cease? There is no statute of limitations against the government; and, if this right to reconsider and annul a patent after it has once become perfect exists in the executive department, it can be exercised at any time, however remote. It is needless to pursue the subject further. The existence of any such power in the land department is utterly inconsistent with the universal principles on which the right of private property is founded."

We have felt at liberty to quote quite extensively from the case of *U. S. v. Schurz*, because, in our judgment, it is absolutely decisive of this controversy, and the doctrine there laid down is fully sustained by subsequent decisions. *Hardin v. Jordan*, 140 U. S. 401; *Noble v. U. R. L. R. Co.* 147 U. S. 176; *In re Emblen*, 161 U. S. 52, 56; *U. S. v. Marshall Silver Mining Co.* 129 U. S. 587, 588; *Iron Silver Mining Co. v. Campbell*, 135 U. S. 301. The case of *Reynolds v. Plymouth Co.* 55 Iowa, 90, was one where it was held that the party making the entry acquired no title or equity, for the reason that the scrip used in making it was forged and counterfeit.

It is clear, we think, that, by the entry and issuing of the patent, the lands therein described were segregated from the public domain, and were no longer subject to entry or disposition under the general land laws, and that the title thereto was vested in Hiram S. Allen. The land department could not deal with the land in any way whatever until the patent should be canceled, at the suit of the United States, by a bill in equity. It became in 1854, when the patent was issued, and has ever since so remained, subject to the laws of the state in relation to taxation, and to sale and conveyance in case of nonpayment of the taxes assessed thereon. The act of the department in canceling the patent, and in setting aside the entry, after it had been carried into

and merged in the patent itself, was a nullity. This court has recognized the principle to be that "whenever the question in any court, state or federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." *Paige v. Peters*, 70 Wis. 182; *Wilcox v. Jackson*, 13 Pet. 516, 517.

The proceeding by which the patent in this case was canceled for mistake, without notice of any kind to the plaintiff, who acquired or claimed to have acquired the title by tax deeds to the land, and who was interested in contesting the question of whether any mistake had occurred, but was not cited before the land department in relation to it, is without authority of law. He was entitled to litigate the question of mistake before a competent tribunal, upon notice and proper allegations. It seems preposterous to say that the record made up in his absence, by the commissioner of the general land office, in the case before us, upon *ex parte* affidavits, can bind or affect his rights in the least degree, or be received as evidence to show that the alleged mistake in the entry in fact occurred. Aside from the letter of the commissioner of the general land office, the evidence tending to show such mistake consists of the fact that Allen, some years after the entry, recorded the certificate, and also executed and delivered to a third party a warranty deed of the *S. W.* ¼ of the section, which, it is claimed, he applied in fact to enter; but this evidence is unsatisfactory and insufficient. The general doctrine is that when, in a court of equity, it is proposed to set aside or annul or correct a written instrument for fraud or mistake in the execu-

tion of the instrument itself, the testimony upon which this is done must be clear, unequivocal, and convincing, and that it cannot be done on a bare preponderance of evidence, which leaves the matter in doubt. The rule is well settled that where the attempt is to annul or avoid grants, patents, or other solemn evidences of title, emanating from the government of the United States under its official seal, the great importance and necessity of the stability of titles demands that the effort to set them aside, annul or avoid them, or to correct mistakes in them, shall only be successful when the evidence is clear, strong, and satisfactory. *Maxwell Land-Grant Case*, 121 U. S. 379–381; *U. S. v. Des Moines Nav. & R. Co.* 142 U. S. 541; *U. S. v. Budd*, 144 U. S. 161. There is, in our judgment, no legal or competent evidence in the case sufficient to sustain the contention upon which the defendant relies, that, by reason of the alleged mistake, the lands in question never became taxable.

For these reasons, we hold that the patent to the land in question is, and has been, in full force and effect, and the land has been taxable, ever since the patent was issued, December 15, 1854.

The contention that the second tax deed was void because Woodward, the grantee therein, was a tenant in common with his co-grantee in the first tax deed, is not maintainable. The land had been sold in both instances to the county, and the tax deeds were issued to its respective assignees. It does not appear when Woodward acquired the tax certificate upon which he took his tax deed, nor that, when he acquired it, he was under any obligation, legal or equitable, to pay the taxes on account of which the sale was made, mentioned in the first tax deed, to Putnam and Woodward, or that he was then tenant in common with Putnam; nor does it appear that Putnam, or any one claiming under or in privity with him, is making any objection to the validity of the tax deed to Woodward.

Other objections were made to the tax deeds, but they do not seem to require special attention. The circuit court, we think, erred in holding that the land did not become taxable.

By the Court.—The judgment of the circuit court for Chippewa county is reversed, and the cause is remanded with directions to render judgment as prayed for, in favor of the plaintiff, with nominal damages.

WINSLOW, J. In my judgment, the findings of fact are amply sustained by the evidence. The fact was that Allen, in 1854, purchased and duly entered the S. W. ¼ section, and received and recorded the proper duplicate receipt upon such entry, which receipt described said S. W. ¼. Neither he nor any one else ever purchased or entered, or tried to purchase or enter, the S. E. ¼ section, but a mistake was made in the land office at La Crosse, by which the entries in the books indicated that the S. E. ¼ section had been entered by Allen, and a patent was by mistake executed for said S. E. ¼, but never delivered to Allen. These errors seem never to have been known to Allen. Under these circumstances, the simple question is whether the S. E. ¼ became taxable by the state.

Certainly, the *S. W.* ¼ had become taxable, because it had been entered and paid for. The issuance of a patent was not essential. *Ross v. Outagamie*, 12 Wis. 29; *Railway Co. v. Prescott*, 16 Wall. 603. Only one quarter section had been sold, and hence only one became taxable, and that one was clearly the S. W. ¼. To hold that the S. E. ¼ was also taxable would be to hold that a whole half section had become subject to taxation, notwithstanding the fact that but one quarter section had been sold. This seems to me almost, if not quite, absurd.

There are no questions here of *bona fide* purchasers. The state could not tax lands which were owned by the United

States. A tax-title claimant buys at his peril. He is not a *bona fide* purchaser. He gets nothing unless the state had legal power to tax the property. The question is whether the property belonged to Allen when it was taxed. If it did not belong to Allen, then it belonged to the United States, notwithstanding the erroneous patent, and was not taxable. The question whether it belonged to Allen or to the United States is the key to the whole problem, and it must necessarily be decided as though it arose between Allen and the United States, because neither the state nor the tax-title claimant is entitled to urge *bona fides* or estoppel. As between Allen and the United States, Allen owned only one quarter section, and that was the S. W. ¼; and it necessarily follows that the title, *i. e.* the entire beneficial interest, in the *S. E.* ¼ remained in the United States, and hence was never taxable. *Reynolds v. Plymouth Co.* 55 Iowa, 90.

In my opinion the judgment should be affirmed.

MARSHALL, J., took no part.

KASSON, Respondent, vs. TOUSEY, imp., Appellant.

May 24 — June 11, 1897.

Mortgages: Foreclosure: Deficiency judgment.

In an action to foreclose a second mortgage the owner of the first mortgage did not appear, but upon motion of the plaintiff judgment was rendered directing that the proceeds of the foreclosure sale be applied so far as necessary to pay off the first mortgage. The plaintiff bid in the premises at the sale for less than the amount due on his mortgage. The sheriff paid the net proceeds to him and he retained the same. *Held*, that a deficiency judgment against the mortgagor for the amount due on the first mortgage was erroneous.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

This action was brought to foreclose a mortgage executed December 9, 1891, by the defendant *Benjamine C. Tousey* to the defendant D. C. Sullivan, for $1,433.34 and interest, upon certain lots and tracts of land in Douglas county, and assigned by said Sullivan to the plaintiff. It appears upon the face of the complaint that it was a second mortgage, and was subject to a mortgage of even date therewith, by the same mortgagor to the defendant R. C. Jefferson, for $1,800. The plaintiff, in his complaint, without stating how much was due for principal and interest on the said mortgage, alleged that the proceeds arising out of the sale of the premises mortgaged should be first applied to the payment in full of the mortgage to the defendant Jefferson, and judgment of foreclosure of the second mortgage was demanded, and sale of the mortgaged premises, and that the surplus, if any, arising from such sale be brought into court to abide the further order of the court, and that judgment be given against the mortgagor for any deficiency, and for general relief, but no relief was prayed against the defendant R. C. Jefferson, nor was it sought to redeem said premises from his mortgage. The defendant Jefferson was served with the summons and notice of object of the action, which stated in brief that the object of the action was to foreclose the second mortgage, and no other relief was prayed, and that no personal claim was made against him. He did not appear in the action. The defendant *Tousey* appeared and answered.

The amount due on said second mortgage was found to be $1,694.05 for principal and interest. It was also found that there was due on the prior mortgage the sum of $1,800, according to a note dated December 9, 1891, due two years from date, with interest at eight per cent. per annum, which was to be first paid out of the foreclosure and sale of the property. The court ordered judgment of foreclosure, ad-

judging a sale of the entire mortgaged premises, the proceeds of sale to be applied, after deducting the costs of the action and expenses of sale, to the payment of the prior mortgage first, then to the payment of the sum due on the second mortgage as therein found and determined, with interest, and, in case of deficiency, after applying the proceeds of said sale, the usual judgment against *Benjamine C. Tousey* might be had according to law. Thereupon judgment of foreclosure and sale was rendered in the usual form, of the second mortgage, for the amount due to the plaintiff for principal and interest, and for the payment of the proceeds, after the expenses of sale, as follows: The sum of $1,800, with interest at seven per cent. per annum, or so much as the purchase money of the mortgaged premises will pay of the same, on the first note and mortgage, and the balance to "the payment of the notes and mortgage herein foreclosed upon." The sheriff was to take a receipt therefor, and file it with his report of sale, and deposit the surplus money, if any, with the clerk of the court. If the proceeds were insufficient to pay the amounts aforesaid, the sheriff was to specify the deficiency, and judgment was to be rendered against the defendant *Benjamine C. Tousey*, who is personally liable for the payment of the debt secured by said mortgage, "for the amount of such deficiency, with interest thereon from the date of the report, and that the plaintiff have execution therefor."

The judgment did not purport to foreclose the rights of any one except the defendant *Tousey* and his heirs, respectively, and all persons claiming under him or them after the filing of the notice of pendency of the action. The mortgaged premises were sold by the sheriff July 3, 1895, to the plaintiff, *James Kasson*, for $1,300, and were conveyed to him accordingly. The sheriff reported he had paid the costs and expenses of foreclosure out of said sum, and had paid to said plaintiff the residue of $1,168.71, and had executed

to said plaintiff, *Kasson*, a conveyance of said premises. He certified that the moneys arising from the sale were insufficient to pay the whole amount "adjudged to be due to said plaintiff, together with interest and costs, and that, after applying the purchase money arising from such sale, there is yet due to said plaintiff, and unsatisfied, the sum of $2,644.67." The sale was afterwards confirmed.

On the 13th of August, 1895, after reciting the amount so reported due from the defendant *Benjamine C. Tousey* to the plaintiff, *James Kasson*, for deficiency as aforesaid, judgment was rendered that the plaintiff, *James Kasson*, recover from said defendant *Benjamine C. Tousey* the sum of $2,644.67, which appears to be $860.48 more than was found due on the plaintiff's notes and mortgage. It is evident from the record that this amount of deficiency was arrived at by adding to the amount found due to the plaintiff on his second mortgage the entire amount found due on the first mortgage to the defendant Jefferson, and by deducting therefrom the net proceeds of the sale of the mortgaged premises, after paying costs and expenses, of $1,168.71. Applying said net proceeds of the sale to the amount due on the second mortgage to *Kasson*, there would be a deficiency remaining of only $558.55, but in arriving at this result no account would be taken of the amount due to the defendant Jefferson on the first mortgage. The defendant *Tousey* appealed from said judgment for deficiency of $2,644.67.

Victor Linley, for the appellant.

For the respondent the cause was submitted on the brief of *H. E. Ticknor* and *J. P. Geiser*.

PINNEY, J. An examination of the record shows that the first mortgage on the premises, held by the defendant Jefferson, has not been foreclosed, and it is apparently outstanding and in full force. The defendant Jefferson did not set up any claim in the action for its foreclosure, or for the

proceeds of the foreclosure sale, and the judgment of foreclosure does not purport to affect this mortgage in any way whatever, except that it appears to have been provided by the judgment entered upon the motion of the plaintiff, *Kasson*, on his mortgage, which was subsequent and expressly subject to Jefferson's, that the proceeds of the foreclosure sale, after the payment of costs, etc., should be first applied, so far as necessary, to pay off Jefferson's mortgage. But the judgment was not executed in that manner. Instead of paying the net proceeds of the sale upon the Jefferson mortgage, they were paid to and appropriated by the plaintiff, *Kasson*, leaving the deficiency due in fact on the decree in his favor only $558.55, and Jefferson's mortgage wholly unpaid and still remaining a lien upon the premises purchased by and conveyed to *Kasson* on the foreclosure sale, for all that now remains due on it. Evidently *Kasson* now holds the premises subject to that mortgage. Jefferson has never applied to the court to obtain the net proceeds of the mortgage sale, and has apparently acquiesced in the appropriation thereof by *Kasson*, content with his prior unsatisfied mortgage lien. It is certain that the plaintiff, *Kasson*, is not entitled to a judgment as for deficiency or otherwise against the defendant *Tousey*, for money that *Tousey* owes Jefferson. Having received and appropriated the net proceeds of the foreclosure sale, he is in no position to claim a judgment against the defendant *Tousey* for any greater sum than the debt due to him, after deducting the net proceeds of the foreclosure sale, leaving $558.55 deficiency, instead of $2,644.67. This will leave Jefferson in a position to enforce his mortgage against the premises purchased by *Kasson* at the foreclosure sale for whatever sum may be due on it.

The proceedings in the action have been conducted in a very imperfect and unsatisfactory manner, but we think that the view we have taken of the rights of the parties will accomplish the ends of substantial justice without a violation of legal principles.

It follows that the judgment for deficiency appealed from must be reversed, and the cause remanded to render a judgment for deficiency in favor of the plaintiff against the defendant *Tousey* for $558.55, instead of $2,644.67.

By the Court.—Judgment is ordered accordingly.

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BOOTH, Respondent, vs. DEAR and others, imp., Appellants.

May 25 — June 11, 1897.

Banks and banking: Statutory liability of stockholders: How enforced: Exhausting assets: Pleading.

To enforce the statutory liability of stockholders of a corporation for its debts it is not necessary first to proceed under secs. 3216–3222, R. S., to sequestrate the property of the corporation and forfeit its franchise; but the action may be brought under secs. 3223, 3224, and the complaint therein need not allege a prior judgment against the corporation or that its assets have been exhausted, although, before judgment against the stockholders, the insufficiency of the assets and the necessity of a resort to the stockholders' liability should be made to appear. Expressions to the contrary in *Cleveland v. Burnham*, 55 Wis. 598, and *Cleveland v. Burnham*, 64 Wis. 347, disapproved.

APPEAL from an order of the superior court of Douglas county: CHAS. SMITH, Judge. *Affirmed.*

This action was brought to enforce the statute liability of stockholders of the defendant the Douglas County Bank. The plaintiff, complaining on behalf of himself and of creditors of the bank who might wish to become parties to the action, alleged that the defendant corporation, during all the times mentioned in the complaint, had been a duly organized banking corporation, under the laws of the state of Wisconsin; that its capital stock was $50,000; that on the 27th day of May, 1895, it made an assignment for the benefit of its creditors, which assignment was completed in all

respects, as required by the laws of this state; that, at the time of the making of such assignment, the bank was indebted to the amount of $135,000, and that its assets did not exceed $20,000; that the bank had wholly ceased doing business; and that it did not possess any property whatever subject to execution or to sequestration in equity. There were further allegations showing who were stockholders during the six months prior to the making of the complaint, and during the time the indebtedness of plaintiff mentioned existed, together with the amount of stock owned by each of such stockholders. There were further allegations to the effect that the amount of plaintiff's debt at the time of the making of the assignment and the commencement of the action was $713.86; that he duly filed proof of his claim therefor in the assignment proceedings, but had not received any dividend thereon. The complaint contained further allegations to the effect that on the 11th day of December, 1894, the defendant bank was indebted to one William Brown in the sum of $10.10, and that such proceedings were duly had to collect such indebtedness that a judgment was rendered therefor in a court of competent jurisdiction; that such judgment was thereafter duly transcribed to the circuit court for Douglas county, Wisconsin, and execution duly issued thereon out of such court, and placed in the hands of the sheriff of Douglas county for collection; and that the same was on the 16th day of August, 1895, returned by such sheriff wholly unsatisfied; and that on the 19th day of August, 1895, and before the commencement of this action, such judgment was, for value, assigned to the plaintiff; and that he was the owner thereof at the time of the commencement of this action; and that there was due to him thereon $16.85.

The defendants demurred to the complaint upon two grounds, one being that such complaint fails to state facts sufficient to constitute a cause of action against them. The demurrer was overruled, and such defendants appealed.

For the appellants there was a brief by *Hughes & Whitford* and *Reed & Reed*, and oral argument by *Myron Reed.*

For the respondent the cause was submitted on the brief of *Yate H. V. Gard.*

MARSHALL, J. It is contended on the part of appellants that proceedings to enforce the statutory liability of the stockholders of a banking corporation to its creditors cannot be resorted to till the franchise of the corporation is forfeited and its assets are exhausted; that the complaint in this action does not show such facts in respect to the defendant bank, but, on the contrary, shows a considerable amount of property in the hands of its assignee in trust for creditors; hence that the requisite facts do not appear to make out a good cause of action against the stockholders.

The general principles governing the statutory liability of stockholders of a banking corporation, in *Gianella v. Bigelow, ante*, p. 185, have been so recently laid down by this court, citing previous adjudications on the subject, that further discussion thereof at this time is unnecessary. The statute creating the liability of the stockholders of a state banking corporation (sec. 47, ch. 479, Laws of 1852) provides as follows: "The stockholders in every corporation or association, organized under the provisions of this act, shall be individually responsible to the amount of their respective share or shares of stock, for all its indebtedness and liabilities of every kind." Such statute received construction at an early day, to the effect that "the liability is primary and absolute, and attaches the moment the debt is contracted by the bank — that it is a liability of all the stockholders to all the creditors, on the principle of a copartnership, the stockholders standing on substantially the same footing as though they were partners, . . . save only that the responsibility of each is limited to a sum equal to his share or shares of stock. Subject to this limitation they are answerable

as original and principal debtors, and their liability more nearly resembles that of copartners than any other with which it can be compared." The language quoted is that of DIXON, C. J., in *Coleman v. White*, 14 Wis. 700, and what is there decided has since been firmly adhered to. *Cleveland v. Marine Bank*, 17 Wis. 545; *Merchants' Bank v. Chandler*, 19 Wis. 434; *Terry v. Chandler*, 23 Wis. 456; *Gianella v. Bigelow*, *ante*, p. 185. By the same adjudications and others, it is settled that the statutory liability of the stockholders of such a corporation must be enforced by suit in equity, in which all the creditors join as plaintiffs, or some one of them sues for the benefit of all; and all the stockholders, unless for some sufficient reason they cannot be brought before the court, must be joined as defendants with the corporation, unless it has been dissolved or its assets have been exhausted, so that there is no property to be reached in the proceedings for the benefit of creditors. *Sleeper v. Goodwin*, 67 Wis. 577.

In the early cases it was held that the intent of the legislature was that the equitable remedy provided by secs. 21–32, ch. 148, R. S. 1858, shall be resorted to, to enforce the statutory liability under discussion, and that such remedy is exclusive. With some changes, such sections are preserved in secs. 3223 and 3224, R. S. 1878, which are as follows:

"Sec. 3223. Whenever any creditor of any corporation shall seek to charge the directors, trustees or other officers or stockholders thereof, on account of any liability created by law, he may commence and maintain an action for that purpose in the circuit court, and may at his election join the corporation in such action.

"Sec. 3224. The court shall proceed therein as in other cases, and when necessary shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers, who shall possess all the powers conferred and be subject to all the obligations

imposed on receivers by the provisions of section three thousand two hundred and nineteen; but if, upon the filing of the answer or upon the taking of such account, it shall appear that the corporation is insolvent, and that it has no property or effects to satisfy such creditor, the court may proceed without appointing any receiver to ascertain the respective liabilities of such . . . stockholders, and enforce the same by its judgment as in other cases."

Counsel for appellants are in error in respect to this being a proceeding, under secs. 3216 to 3222, to sequestrate the stock and property of the corporation and forfeit its franchise. It is a proceeding under secs. 3223 and 3224, to charge stockholders of the corporation on account of their personal liability created by law.

While such liability, as before stated, is primary and absolute, the remedy for its enforcement is in equity and governed by equitable principles clearly defined. The legislative intent clearly was that such liability shall be enforced only so far as reasonably necessary to satisfy the liabilities of the corporation to its creditors. The language of sec. 3224 in that regard is plain, and its meaning unmistakable. It provides in mandatory language that the court shall proceed in the action to take *an account of the property and debts due to and from the corporation, and shall appoint a receiver or receivers if necessary, but that if it shall appear that the corporation is insolvent and that it has no assets with which to satisfy a creditor, the court may then proceed, and, without appointing any receiver, ascertain the respective liabilities of the stockholders, and enforce the same by a judgment.* Such language has heretofore led to frequent expressions, without the question being directly involved, to the effect that the liability created by law cannot be enforced at all till the assets of the corporation have all been exhausted by reducing the same to money and making application thereof in discharge of the liabilities of the corporation, so far as the same

will go for that purpose, as in *Cleveland v. Burnham*, 55 Wis. 598, where, in the opinion of Mr. Justice COLE, occurs this language: "It is admitted by all the counsel *that the assets and property of the bank* must be first exhausted before the stockholders who are liable can be called upon to make good any deficiency;" and in *Cleveland v. Burnham*, 64 Wis. 347, where this language was used by Mr. Justice ORTON: "The liability of the . . . stockholder . . . became fixed and certain, and his indebtedness . . . liquidated and due, from the date of the judgment by which it was ascertained that the assets and property of the bank had been exhausted and the indebtedness of the plaintiffs or the balance of the judgment exceeded the amount of the defendant's stock." There are many respectable authorities holding that the statutory liability of stockholders cannot be enforced in equity in any case till the assets of the corporation are first exhausted. See Cook, Stock, § 219. Such is undoubtedly the general rule where there is no statute regulating the practice, so as to require the liability to be enforced independent of whether there are assets applicable to the payment of the creditor or not.

It is quite clear that a proper construction of secs. 3223 and 3224, notwithstanding previous expressions of the court referred to by which the point was really not decided, does not require that the assets of the corporation shall be fully exhausted before the creditors may proceed to judgment against the stockholders. The legislative intent obviously was that the court should so administer the affairs of the corporation as to satisfy its liabilities out of its assets so far as practicable, and, upon the fact appearing that the stockholders' liability would be required in order to fully pay the corporation debts, to enforce such liability, and, if necessary, by judgment against such stockholders. It is therefore sufficient to warrant proceeding to judgment in an action of this kind, that it be made to appear that the liability of the

stockholders will have to be ultimately resorted to in order to fully pay the corporation debts. The facts in that regard do not go to the cause of action. Therefore it is not essential to the complaint that such facts be alleged therein. It is sufficient to allege and show that the plaintiff is a creditor of the corporation, having a debt due and payable; that he sues on behalf of himself and all other creditors of the corporation; that the defendants are stockholders liable for such indebtedness, under sec. 47, ch. 479, Laws of 1852; and that, if the corporation be not made a defendant, sufficient reason be set forth to warrant the omission. Prior judgment against the corporation, in the action to enforce such liability, is not necessary to exist or be pleaded, or want of assets of the corporation to meet its liabilities. The liability of the stockholders for the payment of the liabilities of the bank, to the amount of their respective holdings of stock, is primary and absolute, and the right to commence and maintain an action to enforce such liability is also absolute, and clearly given by secs. 3223 and 3224, R. S., and without conditions other than above indicated, though the proceedings to that end, in the action, require an ascertainment of the necessity therefor before entering judgment against such stockholders.

It follows from what has preceded that the appellants' contention that the complaint does not state a cause of action, because it does not show that the assets of the corporation have been exhausted, cannot be sustained.

By the Court.— The order of the superior court overruling the demurrer to the complaint is affirmed.

WAREHOUSE & BUILDERS SUPPLY COMPANY, Respondent, vs. GALVIN and others, Appellants.

96 523
104 279

96 523
116 485

May 25 — June 11, 1897.

Jurisdiction of state and federal courts: Admiralty: Liens: Common carriers: Entire contract: Replevin.

1. The owner of a vessel, as a common carrier, has at common law a particular and specific lien for his freight upon goods carried, which may be enforced in a state court.
2. An action of replevin, brought by the owner and consignee of goods shipped by water to recover possession thereof from the owner of the vessel and those claiming under him, who claimed a lien thereon growing out of the contract of carriage, is a proceeding to enforce a common-law remedy, and not a proceeding in admiralty. The state courts were not therefore deprived of jurisdiction over the action by sec. 2, art. III, Const. of U. S., or by subd. 8, sec. 563, R. S. of U. S., vesting exclusive admiralty and maritime jurisdiction in the federal courts, but expressly saving to suitors the right of a common-law remedy where the common law is competent to give it.
3. A contract to carry 5,000 bushels of salt between certain points at ten cents per barrel is an entire contract, and if only a part of that amount is actually delivered for carriage, the carrier is entitled to a lien thereon, at the end of the transit, for the entire contract price.
4. Where a shipper fails to deliver to a vessel the full amount of goods which he has contracted to furnish, the lien of the vessel upon the goods delivered is enforceable in admiralty, whether the action be regarded as one to recover freight or for damages for the nonperformance of a contract.
5. Where a person has a lien upon goods which would be enforced by the federal courts as courts of admiralty, the owner of the goods cannot recover them in an action of replevin brought in the state courts.

APPEAL from a judgment of the superior court of Douglas county: CHAS. SMITH, Judge. *Reversed.*

This action of replevin was commenced June 21, 1895, to recover possession of 415 barrels and 607 sacks of salt, in all

equivalent to 818 barrels, of the admitted value of $600, by the plaintiff, a wharfinger and warehouseman, and owner of the salt, at West Superior, against the defendants *Rooney* and *Beardsley*, copartners doing business under the firm name of the Superior Warehouse Company, and as such operating a warehouse at that place, and also against the defendants *Galvin*, *Donnacher*, and *Tyler*, owners of the steamer Saginaw Valley, and engaged in operating the same, and *W. E. Clark* and *H. B. Erhart*, as master and agent of the same vessel.

The cause being at issue, and trial having been had by the court (a trial by jury having been expressly waived), at the close thereof the court found as matters of fact, in effect, the facts stated, and also that June 10, 1895, the Saginaw Valley left Buffalo, New York, for West Superior; that before leaving Buffalo the plaintiff entered into a contract with the owners of the Saginaw Valley, by the terms of which the Saginaw Valley was to transport 5,000 barrels of salt for the plaintiff from Marine City and St. Clair, Michigan, to the plaintiff's dock at West Superior, at the agreed price of ten cents a barrel, the plaintiff to load and unload the same, or to pay the cost of loading and unloading the salt thereon; that the vessel reserved space for 5,000 barrels, and had the same reserved when at Marine City and St. Clair, June 14, 1895; that when the vessel arrived at Marine City and St. Clair the plaintiff only furnished for transportation barrels and sacks equivalent to 818 barrels, as mentioned, leaving a shortage of 4,182 barrels of salt, which the plaintiff had so agreed to furnish; that the defendants made diligent effort to obtain a sufficient cargo to fill the place of the 4,182 barrels of salt so short, but were obliged to make the voyage without any additional cargo; that June 19, 1895, the Saginaw Valley reached the plaintiff's dock at West Superior with said cargo, and notified the plaintiff of the arrival; that by reason of such failure of the

plaintiff to furnish said additional 4,182 barrels of salt the owners of the Saginaw Valley were damaged in the sum of $418.20; that upon so reaching the plaintiff's dock the defendants *Clark* and *Erhart*, as such master and agent, demanded pay of the plaintiff for the damages so sustained, and refused to deliver the salt then on board unless the plaintiff would pay such damages; that the plaintiff then refused to pay such damages, or to receive the salt subject to charges for such damages, but offered to pay and tendered payment for transporting 818 barrels, so then on board, at the rate of ten cents per barrel, and, in addition, to pay the handling charges, but the defendant refused to accept the offer; that thereupon the vessel left the plaintiff's dock, and proceeded to the dock of the Superior Warehouse Company, and unloaded the same in their warehouse, under instructions from the master not to deliver the same to the plaintiff, except upon the order of *Erhart;* that June 20, 1895, *Erhart* gave the plaintiff an order upon the Superior Warehouse Company, to deliver to the plaintiff the salt so on board, but before the same was acted upon *Erhart* countermanded the order, and directed the Superior Warehouse Company not to deliver the salt to the plaintiff; that the plaintiff then duly demanded the salt from the defendants, and upon their refusal to deliver the same commenced this action, and replevied the salt, and delivered the same to the plaintiff, who still had the possession thereof, and that the value thereof was $600; that the charges of the Superior Warehouse Company for receiving and storing the salt since the commencement of this action were $61, which had been paid by the owners of the vessel; that the Saginaw Valley was delayed one day at Marine City and St. Clair by reason of the plaintiff's failure to furnish the 4,182 barrels of salt mentioned, but the defendants made no claim to the plaintiff at the time for demurrage for such delay, nor did they set up any specific claim for demurrage in their answer, but

did claim the same on the trial under the general denial, but the proof thereof was rejected by the court; that the plaintiff's damages for such detention of the salt were six cents, and the charges for transporting 818 barrels were $81.80, and the cost of unloading was $12; that the Saginaw Valley so received the salt from the Michigan Salt Works, from which the plaintiff had purchased the same and was the owner thereof.

As conclusions of law, the court found, in effect, that the plaintiff was entitled to judgment against all of the defendants for the possession of the salt so replevied; and a judgment against all the defendants for six cents damages and the costs and disbursements in this action, to be taxed, and ordered judgment accordingly. From the judgment so entered thereon the defendants appeal.

For the appellants there was a brief by *H. H. Grace* and *H. R. Spencer*, and oral argument by *Mr. Grace.*

For the respondent the cause was submitted on the brief of *Frederick H. Remington.* He contended, *inter alia*, that it is established that the shipowner has no lien upon the goods shipped for the freight upon those not shipped, but is left to an action for damages. *Phillips v. Rodie*, 15 East, 547; *Birley v. Gladstone*, 3 Maule & S. 205; *Gray v. Carr*, L. R. 6 Q. B. 522. The carrier's lien is a particular or specific lien attaching only to the specific goods in his possession, and in general only secures the unpaid price of carriage of those specific goods. 1 Jones, Liens, §§ 265–281; *Crommelin v. N. Y. & H. R. Co.* 4 Keyes, 90; *Leonard's Ex'rs v. Winslow*, 2 Grant (Pa.), 139; *Hartshorne v. Johnson*, 7 N. J. Law, 108; *Butler v. Woolcott*, 2 Bos. & P. N. R. 64; 8 Am. & Eng. Ency. of Law, 975. The state court had jurisdiction. *Crawford v. Roberts*, 50 Cal. 235; *Southern Dry Dock Co. v. The J. D. Perry*, 23 La. Ann. 39; *Leon v. Galceran*, 11 Wall. 185; *Rake v. The Potomac*, 6 Bush, 25; *Parisot v. Helm*, 52 Miss. 617; *Bohannan v. Ham-*

mond, 42 Cal. 227; *Home Ins. Co. v. N. W. P. Co.* 32 Iowa, 223; *Baird v. Daly*, 57 N. Y. 237; *Steamboat Co. v. Chase*, 16 Wall. 522; *Sherlock v. Alling*, 93 U. S. 99; *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Stewart v. Harry*, 3 Bush, 438; *Percival v. Hickey*, 18 Johns. 257; *Chisholm v. Northern Transp. Co.* 61 Barb. 363; *Daily v. Doe*, 3 Fed. Rep. 903.

CASSODAY, C. J. It is claimed that the trial court had no jurisdiction of the subject matter of the action. This is put upon the ground that such jurisdiction is vested exclusively in the federal courts of admiralty and maritime jurisdiction. Sec. 2, art. III, Const. of U. S.; subd. 8, sec. 563, R. S. of U. S. In support of such contention counsel rely upon cases holding that upon an ordinary contract of affreightment the lien of the shipper is a maritime lien; and a proceeding *in rem* to enforce it is within the exclusive original cognizance of the district courts of the United States. *The Belfast*, 7 Wall. 624. But the statute giving to federal courts such exclusive jurisdiction "of all causes of admiralty and maritime jurisdiction," expressly saves "to suitors in all cases the right of a common-law remedy *where the common law is competent to give it.*" Sec. 563, *supra*. The same clauses are contained in the section of the federal statutes expressly making the jurisdiction vested in the federal courts in certain cases "exclusive of the courts of the several states." Subd. 3, sec. 711, R. S. of U. S. "The distinguishing and characteristic feature" of a suit in admiralty, to use the language of Mr. Justice FIELD, "is that the vessel or thing proceeded against is itself seized and impleaded as a defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decree validity against all the world. By the common-law process, whether of mesne attachment or execution, property is reached only through a personal

defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common-law proceeding, the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold." *The Moses Taylor*, 4 Wall. 427.

This is certainly not a suit in admiralty. On the contrary, it is an ordinary action of replevin, brought by the owner and consignee of the goods shipped against the owners of the boat transporting the same, and those claiming under them, to recover possession of the goods shipped. It is one of the common-law remedies saved to suitors, so far as the common law is competent to give such remedy. The court, therefore, had jurisdiction of the action, and could retain the same, so far as to determine the questions within its rightful jurisdiction.

The defendants, as common carriers, had a particular and specific lien at common law upon the goods so carried for their freight in carrying the same. 1 Jones, Liens, §§ 262, 263. The same author says: "Carriers by water have a lien as well as carriers by land. A shipowner has a lien for freight upon the goods carried, whether the vessels be chartered or be general ships carrying goods for all persons for hire. The master is not bound to deliver possession of any part of his cargo until the freight and other charges due in respect to such part are paid. This lien may be regarded as a maritime lien, because it is cognizable in the admiralty, and under the usages of commerce arises independently of the agreement of the parties. The shipowner may retain the goods until the freight is paid, or he may enforce it by a proceeding *in rem* in the admiralty court; but, although the lien is maritime and cognizable in the admiralty, it stands upon the same ground with the common-law lien of the carrier on land, is subject to the same principles, *except as regards enforcement*, and may, therefore, be considered

in connection with the liens of carriers by land." Id. §§ 270, 271. See, also, Hutchinson, Carriers, §§ 476–479. The court, therefore, had jurisdiction to determine the amount of such lien for carriage at common law, and whether the amount of freight tendered by the plaintiff was sufficient to discharge the same.

True, the statutes of this state provide, among other things, in effect, that every ship, boat, or vessel used in navigating the waters of this state shall be liable to a lien thereon (3) for all demands or damages accruing from the nonperformance or malperformance of any contract of affreightment, or any contract touching the transportation of property entered into by the master, agent, owner, or consignee of the ship, boat, or vessel on which such contract is to be performed; such lien "to be enforced by proceedings in admiralty," or in the cases therein mentioned as therein prescribed,— that is to say, by attachment. Secs. 3348, 3351, S. & B. Ann. Stats. But the plaintiff is not here seeking to enforce any such lien against the boat, and hence the statutes give no support to this action.

The question recurs whether the owners of the vessel, and those acting under them, had the right to retain the possession of the 818 barrels of salt so carried until such owners had been paid, not only ten cents a barrel for each of the 818 barrels so carried, but also ten cents a barrel for each of the 4,182 barrels which the plaintiff failed to furnish for carriage as agreed. We are constrained to hold that the contract to carry the 5,000 barrels of salt at ten cents a barrel, was, in legal effect, an entire contract to carry the 5,000 barrels for $500. In other words, the contract was not divisible. This principle has often been applied by this court to a contract to work for a year, or some other definite time, at so much per month. *Jennings v. Lyons*, 39 Wis. 553; *Diefenback v. Stark*, 56 Wis. 462; *Koplitz v. Powell*, 56 Wis. 671. The reasons for the rule are sufficiently stated in these cases.

The principles upon which the rule is based are peculiarly applicable to a contract of affreightment, since the amount of the goods shipped is necessarily an inducement or consideration for making the contract. Such being the nature of the contract, it is manifest that the tender of freight by the plaintiff was insufficient, and hence that the plaintiff is not entitled to recover the possession of the salt in this action.

But, even if we were to take a different view of the contract, still we are inclined to hold that the plaintiff could not recover in this action. In this country it is firmly established in admiralty law that the vessel and the cargo have reciprocal rights against each other, and reciprocal liens to enforce the rights of each against the other. Parsons, Shipping & Adm. 171. Upon this principle it has been held by federal courts in this country, in effect, that, where a shipper fails to furnish or to deliver to the vessel the full amount of goods which he had contracted to furnish or deliver, the lien of the vessel upon the goods so furnished or delivered would be enforced in admiralty, whether the action be treated as one to recover freight or to recover damages for the nonperformance of a contract. *In re Nine Hundred and Forty-eight Pieces of Lumber*, 7 Ben. 389; *Fox v. Holt*, 4 Ben. 278; *The Eliza's Cargo*, 1 Lowell, 83; *Clarke v. Crabtree*, 2 Curt. 87; *The B. J. Willard*, 8 Weekly Notes Cas. 47; *Giles v. The Cynthia*, 1 Pet. Adm. 203, and note; *Watts v. Camors*, 115 U. S. 353; *The Gazelle and Cargo*, 128 U. S. 474. This principle includes demurrage. This lien of the vessel upon the cargo justified the owners of the vessel, and those acting under them, in retaining possession of the goods actually carried until such lien was satisfied or legally discharged; and it was incompetent for the state court to prevent the vessel from enforcing such lien in admiralty, or to deprive the owners of the vessel of such possession so long as such lien continued. *Stewart v. Potomac Ferry Co.* 12 Fed. Rep. 296. Counsel for the plaintiff has cited English

cases holding a different rule, but we feel bound by the decisions of our federal courts in admiralty cases.

By the Court.—The judgment of the superior court of Douglas county is reversed, and the cause is remanded with direction to dismiss the complaint.

DISHNEAU, Respondent, vs. NEWTON and others, Appellants.

May 25 — June 11, 1897.

Conversion: Attachment: Redelivery: Agency.

In an action for the conversion of plaintiff's horses by a sheriff who had attached them as the property of her husband, it appeared conclusively that for a long time prior to the attachment the horses had been under the complete and exclusive control of the husband; that upon the release of the attachment the sheriff delivered the horses to third persons in pursuance of a contract of sale entered into with them by the husband as plaintiff's agent; and that the release was procured by attorneys in the employ of the husband. *Held*, that the horses had been in legal effect redelivered to the husband, even though the contract of sale was not binding upon plaintiff.

APPEAL from a judgment of the superior court of Douglas county: CHAS. SMITH, Judge. *Reversed.*

This is an action to recover damages for the conversion of six horses. The action was brought against the sureties upon the official bond of one Dan Kennedy, now deceased, who was the sheriff of Douglas county from January, 1891, to January, 1893. The alleged conversion took place in November, 1892, at the city of Superior. At that time the plaintiff was a married woman, living in Michigan. Her husband, Edward Dishneau, was, in company with one Thompson, engaged in business as a railroad contractor, and the firm was working upon a contract at or near Iron River, in this

state, and was using in its business fourteen horses, which were furnished to the firm by Edward Dishneau. The plaintiff testified that all of these horses belonged to her, and had been bought with her own separate estate, prior to her marriage with Dishneau. Dishneau had used and controlled the horses at all times. The work at Iron River was concluded early in November, 1892, and Dishneau sent the horses to Superior, and placed them in a livery stable at that place. On the 15th day of November, while at the livery stable, six of the horses were attached, at the suit of creditors of the firm of Thompson & Dishneau, by Sheriff Kennedy, who, however, left the horses in the custody of the livery-stable keeper. Within three or four days after the attachment writ was served, Dishneau made a written contract with the firm of McCarthy & Thayer, as follows:

"*Know all men by these presents*, that *Clara Dishneau*, by Edward Dishneau, agent, agrees to sell to C. A. McCarthy and John P. Thayer, of Superior, Wis., fourteen head of horses, five wagons, and seven set of harness, for the sum of one thousand dollars, and feed bill, to be paid as follows, to wit: There being an attachment against six of said horses in a suit brought by Carney J. Nesbitt to recover $686 62-100, now pending in the circuit court, it is agreed that said McCarthy and Thayer shall take said horses, and sell the same, and turn the money in to McHugh, Lyons & McIntosh, of West Superior, Wis., until the sum of $1,000 shall have been paid, it being agreed that said attachment shall be released in ten days or as soon as shall be, and clear title given by that time to all the horses, and that none of the money shall be delivered to said *Dishneau* until after the attachment shall have been released, either by the dismissal of the suit or by bond or by a deposit of the necessary amount to release the said attachment with the sheriff; it being the intention of the parties that clear title shall be given before any money shall be turned over to *Dishneau*. [Here follows

a description of the horses.] Said *Dishneau* to execute a bill of sale to each purchaser of said horses at time of sale by said McCarthy and Thayer.

"CLARA DISHNEAU.
"EDWARD DISHNEAU, Agent."

This contract was left by the parties with the law firm of McHugh, Lyons & McIntosh, who were acting in the matter for Dishneau. This firm procured an undertaking to be signed and delivered to the sheriff for the return of the property. Dishneau denies having anything to do with the undertaking, and alleges that he knew nothing of it. He went to Michigan soon after the execution of the contract, and claims that his wife objected to the sale of the horses, but no intimation of such objection was sent to anybody at Superior. Upon receipt of the bond, the sheriff released the horses; that is, he notified the livery-stable keeper that the attachment was released, and he made return upon his writ that an undertaking had been given under sec. 2742, R. S., and that the horses had been delivered to Dishneau. The horses were not, in fact, however, delivered to Dishneau, but were delivered by the livery-stable keeper to McCarthy & Thayer, upon their paying the bill for their keeping.

The plaintiff brought this action in 1894, claiming that the horses were in fact converted by the sheriff. The jury returned a special verdict to the effect (1) that the plaintiff was the owner of the property at the time of the conversion; (2) that the property was never redelivered to Mr. Dishneau; (3) that the value of the horses was $600. On this verdict judgment for the plaintiff was rendered and defendants appealed.

H. H. Grace, for the appellants.

For the respondent there was a brief by *Murphy & Bundy*, attorneys, and *E. B. Bundy*, of counsel, and oral argument by *R. E. Bundy*.

WINSLOW, J. Probably the proof was sufficient to sustain that part of the verdict which finds that the plaintiff owned the horses in question at the time of the alleged conversion, but we are quite well satisfied that the finding to the effect that the horses were not redelivered to Mr. Dishneau is against the weight of the evidence, and was based upon an erroneous instruction.

The court charged the jury upon this question as follows: "The burden here is upon the defendant to show that the property was redelivered to Mr. Dishneau. However, the statute makes the return of the officer presumptive evidence of the facts therein stated. Now, the return of the officer that had this property in charge, and which has been offered in evidence here, states that the property was returned to Mr. Dishneau. That, gentlemen, however, is merely a presumption,—a legal presumption,—that gives way as a matter of course, and yields to any positive credible evidence that it was not redelivered. Here, if you find the horses were delivered by the officer to Thayer & McCarthy, although in pursuance of an arrangement with Mr. Dishneau, by which Thayer & McCarthy were to become the owners of the horses, you will answer 'No' to that question; that is, I say, the delivery of the horses to Thayer & McCarthy was not a delivery to Dishneau, although it was in pursuance of an arrangement,—although made in pursuance of an arrangement between Dishneau and Thayer & McCarthy."

The evidence was conclusive that Dishneau, for a long time prior to the attachment suit, had complete and exclusive control of the horses. He took them where he pleased, employed them as he pleased, and at all times had done as he saw fit with them, with his wife's full consent. He was certainly clothed with apparent ownership. While it may be that he had not authority to sell them, certain it is that he had power to place them in charge of any person he chose. Thus, while the contract of sale to McCarthy &

Thayer may not have been binding upon her as a sale of the horses, still, if McCarthy & Thayer obtained possession of the horses under it, their possession would certainly be rightful, because obtained from the agent of the owner, who had the right to control their possession. They might not be able to enforce their contract of purchase on account of lack of authority in Dishneau to sell, but their possession would be rightful at least until the owner had repudiated the contract of sale and demanded return of the property. The contract expressly provided that McCarthy & Thayer should take possession of the horses upon their being released from the attachment levy. Whether Dishneau actively assisted in or was present at the time of the giving of the bond to release the horses from the attachment levy, we regard as of no moment. The bond was prepared by his attorneys, unquestionably by virtue of their employment, and Dishneau cannot now repudiate their acts. The contract and bond together justified the sheriff in allowing the property to be delivered to McCarthy & Thayer, and such delivery was really, in legal effect, a delivery to Dishneau. The charge to the effect that the delivery of the horses to McCarthy & Thayer was not a delivery to Dishneau, although made in pursuance of the arrangement between Dishneau and McCarthy & Thayer, was therefore erroneous. The defendants were entitled to an instruction, upon the uncontradicted evidence, that the horses had been, in legal effect, redelivered to Dishneau.

By the Court.— Judgment reversed, and action remanded for a new trial.

BUTERO, Respondent, vs. TRAVELERS' ACCIDENT INSURANCE COMPANY, Appellant.

May 25 — June 11, 1897.

Accident insurance: "Intentional injuries:" Murder: Evidence.

1. Under an accident insurance policy exempting the insurer from liability for "intentional injuries inflicted by the insured or any other person," there can be no recovery if the injury was intentional as to the person inflicting it, although accidental as to the insured in that he did not anticipate or expect it. *Button v. Am. Mut. Acc. Asso.* 92 Wis. 83, distinguished.
2. To defeat a recovery under such a policy it is only necessary that the evidence of intentional killing preponderate against the presumption of accident.
3. In an action to recover under such a policy, the evidence — showing, among other things, that the insured was a coal-heaver in the employ of a railroad company; that he was killed about 11 o'clock on a dark, stormy night while at work with one companion in a shed lighted by two lamps; that his death was caused by a pistol bullet in the brain; that the first shot was followed by two others each of which inflicted a mortal wound; that the shots could have proceeded only from the open side of the shed; and that when one of the shots was fired the weapon was so near his body as to discolor his clothing with the powder,— is *held* to establish with reasonable certainty that the insured was murdered, and that the murderer knew his victim and fired with intent to kill him.

APPEAL from a judgment of the circuit court for Washburn county: A. J. VINJE, Circuit Judge. *Reversed.*

This was an action brought on a certificate or policy of insurance in the defendant company, issued to Joseph Butero, the plaintiff's husband, June 4, 1895, in the sum of $1,000, insuring him against loss of time for injuries, not exceeding twenty-six weeks, or, if death should result from said injuries alone within ninety days, it promised to pay his wife the sum of $1,000. It was averred that he received personal injuries which caused his death on the 18th of September, 1895, and that all the conditions of the policy had been per-

formed on the part of the insured. On the back of the certificate or policy are indorsed the following conditions: "This insurance does not cover accident or death resulting wholly or partly, directly or indirectly, from . . . intentional injuries inflicted by the insured or any other person." The defense was that the insured was intentionally murdered or killed, and met his death by intentional violence, inflicted upon him by some person or persons to the defendant unknown.

The evidence was, in brief, that the insured, who was a coal heaver, worked on the Omaha railroad, at Spooner, Wisconsin. On the evening of September 18, 1895, he was in his usual health, and he went to work in the coal shed about 6 o'clock with a companion, Nels Dominique, hoisting buckets of coal into proper position for coaling the engines. They used a hoisting machine worked by cranks, and stood with their backs towards the track upon which the shed opened. They worked there together from 6 o'clock until between 10 and 11 o'clock. It was a very dark night, and it was thundering, lightning, and raining. Dominique testified that he heard three shots fired; that he could not tell which way they came from, because it was thundering so; that he was standing on the left of Butero, and they were just hauling up some coal; that when he heard the shot he ran away, over to the depot about a block distant; that Butero fell when the first shot was fired; that he saw him fall, and then ran away; that he did not see anybody else around there; that they were raising the bucket just as he heard the first shot fired; that Butero had his hand on the crank, and when the first shot came he let it go and fell; that he (Dominique) did not have a pistol that night, and did not shoot Butero himself; that they had two small lanterns, one of them on the right and one on the left of the hoist, to see to work with. It was admitted by the defendant that shots were heard about 11 o'clock on the night in

question by W. E. Clinny, and that he immediately repaired to the coal shed in question where Butero was at work, and there found his dead body lying, with wounds appearing to have been made by a shot, and that he gave notice to the officers of the town, when his body was removed to the engine house in the city hall.

Dr. Barker, a physician and surgeon, testified that he examined the body the next day, when an inquest was held. There were three bullet wounds in the body. One entered a little back of and above the left ear, and probably passed clear through the brain to the opposite plate. He found two bullets lodged back of the right shoulder. One of them evidently passed through from the front, and the other from down below the fixed ribs. Either of the wounds was sufficient to cause death. In his opinion he had been recently wounded or injured by external violence, and his death was caused by either the bullet that passed through his head, or the one that entered below the ribs and passed up through his body to the back of his shoulder. One of the bullets entered near the right shoulder, about six inches from the peak of the shoulder, a little down on the breast. This bullet was taken out in the fleshy part, above the arm pit. The other entered below the fixed ribs on the left side; it was taken out about two inches below and back of the first one, in the fold of the flesh under the back side of the arm pit. The bullets were of the same size,— 38 calibre. He did not take the bullet out of the head. He saw him before his clothes had been removed. The clothes on the right shoulder near the bullet wound were burned on the outside of the frock, and some of the under garments were burned. In his judgment it was by reason of the discharge of the powder that caused the bullet wound, the weapon from which the bullet was fired being so close to the garments or body. There was no burning at the other wounds. He did not see any powder in the clothing. Proofs of loss were produced.

At the close of the testimony the defendant moved the court to direct a verdict for the defendant, which was denied. The court instructed the jury that the burden was on the defendant to satisfy them to a reasonable certainty, and by a preponderance of the evidence, that the insured met his death through intentional violence, inflicted upon him by some person or persons unknown; that the presumption of murder does not arise from the mere fact of external marks of violence upon the body of the deceased, as testified to, but "you must be satisfied from all the evidence, in order to find for the defendant: First, that the insured met his death through bodily injuries inflicted at the hands of some person or persons unknown; second, that at the time such person or persons inflicted such injuries he or they intended to so inflict them upon the body of the said Joseph Butero,— that is, that he or they knew, at the time he or they inflicted such injuries, that he or they inflicted them upon the body of the said Joseph Butero; and if you are satisfied from all the evidence that the person or persons inflicting such bodily injuries knew that he or they were inflicting them upon the body of the said Butero, and intended to so inflict them, then you will find for the defendant, otherwise for the plaintiff." There was a verdict for the plaintiff for $1,018.23. The defendant moved for a new trial, which was denied, and the plaintiff had judgment on the verdict, from which the defendant appealed.

H. W. Chynoweth, for the appellant.

L. H. Mead, for the respondent.

PINNEY, J. The contract upon which the action is founded is that the insurance provided by it "does not cover accident or death resulting wholly or partly, directly or indirectly, from . . . intentional injuries, inflicted by the insured or any other person." In view of the facts in evidence and about which there is really no dispute, the question is

whether the legal presumption invoked by the plaintiff, that the injuries the deceased received were accidental or unintentional, is not wholly repelled or overborne by the evidence. The presumption in question properly applies where there is no evidence to show the circumstances and manner in which the injuries were inflicted. The defendant is not liable if the injuries which caused the death of the insured were intentionally inflicted by himself or any other person. While this is a defense, and the burden of proof is ordinarily upon the defendant, yet, if it appears upon plaintiff's evidence, or upon the entire case, that such injuries were intentionally inflicted, the legal presumption is overthrown. The defense may be established by facts and circumstances, and the inferences properly to be drawn from them, sufficient to satisfy the jury of the truth of the defense with reasonable certainty. It is beyond question or dispute that the insured came to his death by external and violent means. The legal presumption is that his death was not caused by his own suicidal act. The evidence clearly shows that the external and violent means of his death proceeded from some person unknown. The inquiry is as to the question whether the shooting that caused his death was accidental or intentional and with the design of effecting his death; and this question is to be determined from the facts proved, the manner of his death, and all the attending circumstances. If the killing was accidental as to the insured in that he anticipated or expected no injury, but was intentional as to his assassin, then, according to the plain language of the provision of the policy, there can be no recovery. *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661–667; *Mallory v. Travelers' Ins. Co.* 47 N. Y. 52. The case of *Button v. Am. Mut. Acc. Asso.* 92 Wis. 83, was upon a provision materially differing from the one in question, and this case is, therefore, not in point. It is necessary only that the evidence of intentional killing preponderate against the presumption of

accident. *Cronkhite v. Travelers' Ins. Co.* 75 Wis. 119; *Johns v. N. W. Mut. R. Asso.* 90 Wis. 335; *Bachmeyer v. Mut. R. F. L. Asso.* 87 Wis. 337, 338.

The plaintiff's counsel relies upon *Hutchcraft's Ex'r v. Travelers' Ins. Co.* 87 Ky. 300, in which it was held that one assassinated comes to his death by *accidental* means; but in that case there was not, as there is in this, a provision to the effect that the policy of insurance did "not cover accident or death resulting wholly or partly, directly or indirectly, from . . . intentional injuries inflicted by the insured or any other person," and it is not in point. Nor is *American Acc. Co. v. Carson* (Ky.), 36 S. W. Rep. 169, which did not contain the same or a similar provision. The same is true of *Insurance Co. v. Bennett*, 90 Tenn. 256.

The killing was clearly the result of intelligent human agency. Was it accidental or intentional? The assured went, at 6 o'clock in the afternoon, from his supper table, to his employment as a coal heaver in the coal shed, where he was to spend the night with his companion in hoisting coal. The night was a very dark one. It thundered and lightened and rained, particularly at the time he received the fatal shots. They worked continuously until about 11 o'clock, with their backs towards the railway track upon which the coal shed opened, with two lighted lamps near them, and with the upright hoist between them, operated by cranks, one working on either side. When they had partly raised a bucket of coal, and, so far as it appears, when they were utterly unaware of the presence of any human being, they were startled by a pistol shot, which sent a bullet crashing through the brain of the insured, and he fell dead where he had stood; and two other shots, either of which would have proved fatal, were fired in rapid succession into vital parts of his body. His companion, Dominique, instantly fled and ran about a block to the station. He had seen no one about there during the evening, and had heard no one, and there

is nothing to show that the assured had, or that he uttered any word or exclamation. He was presently found dead where he fell, and the evidence tends to show that one of the shots was fired with the weapon so near his body as to discolor his clothing with the burning powder. The shots could have proceeded only from the open side of the shed next to the railway track, and it was lighted with two lamps as stated. The hour and the night was one in which honest men are not likely to be abroad with firearms. The time, place, and circumstances were suited to criminal purposes. It seems impossible for persons of reasonable intelligence to be deceived, in the presence of these pregnant facts pointing unmistakably to only one conclusion. If it were possible to conclude that the first shot was fired accidentally, what are we to think in respect to that question, when it was instantly followed by two other shots, evidently aimed at vital portions of the body of the insured, and which took effect, inflicting fatal wounds? How many shots are we to believe were *accidentally* thus fired in rapid succession upon and into vital parts of the body of the insured, and under circumstances so favorable for assassination, at a time when firearms would be mainly in requisition or use for criminal purposes?

It is contended, however, that there is no evidence that the assassin, at the time he inflicted the wounds, intended to inflict them on the body of the insured,— that is to say, that there is no evidence to show that *he knew*, at the time he inflicted them, that he was inflicting them upon the body of Butero, the insured; and that, in the absence of such proof, the killing must be regarded as accidental, and covered by the provisions of the policy. The case of *Utter v. Travelers' Ins. Co.* 65 Mich. 545, is confidently relied on. In that case the provision of the policy was that the insurance "should not be held to extend . . . to any case of death or personal injury, unless the claimant under this pol-

icy shall establish, by direct and positive proof, that said death or personal injury was caused by external violence and *accidental* means, and was not the result of *design*, either on the part of the insured or of any other person." In that case the testimony was conflicting as to the circumstances of the killing; that of the plaintiff tending to show that the officer knew the insured, and demanded his surrender as a deserter, and shot him in self-defense, while that of the defendant tended to show that the shooting was reckless, and that the officer did not know the deceased, nor that he had shot him, until after the killing. It was held that the case should have been submitted to the jury, and that the design mentioned in the policy must be considered as a design to kill the insured, and, if such design did not exist when he fired the shot, or if he did not know that the man he was shooting at was the insured, then the plaintiff might recover on the policy.

The present case is clearly distinguishable. Here there is evidence sufficient to show that the assassin intended to shoot Butero, the insured, and that when shooting he knew that he was shooting him, and intended to kill him. It is true that no witness has testified to this effect in so many words, but this is the just and proper result of the facts and circumstances given in evidence and in respect to which there is no conflict or dispute. It cannot be expected that the assassin would expressly declare his recognition of his victim, either immediately before or at the time of firing repeated fatal shots in and upon his body. All this is ordinarily to be left to inference, from a variety of facts and circumstances proved before the jury. Here the assassin went to the place, at the late hour of 11 o'clock at night, when a violent storm was prevailing, where Butero worked with his companion, approaching him from behind, when there were two lights burning near him. He did not direct his fire against Dominique, but at once selected his vic-

tim, and sent a bullet through his head from which he fell dead, and he followed it by two other shots, evidently aimed with murderous intent, inflicting wounds either of which would have been fatal, and at a time when the evidence tends to show that he stood near enough to his victim to quite touch him with his extended hand. Had the first shot been fired through accident, and not intentionally, it is not reasonable to suppose it would have been followed at once by others. Is it not a just and reasonable conclusion that the assassin recognized, and had no doubt of the identity of, his victim, and followed the first shot by two others to certainly execute his deadly purpose? There is no evidence, fact, or circumstance tending to show, or even suggest, that the death of Butero, the insured, was accidental, within the meaning of the policy. The facts admit, we think, of but one conclusion. *Res ipsa loquitur.*

We think that the evidence was sufficient to show with reasonable certainty that Butero was murdered, and that his murderer knew his victim when he fired the fatal shot, and that he fired it with intent to kill him. The court erred, in our judgment, in refusing to set aside the verdict and grant a new trial.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

NORTHWESTERN NATIONAL BANK, Respondent, vs. RAMSEY, imp., Appellant.

May 25 — June 11, 1897.

Land contracts: Application of payments by assignee of vendor: Tender of conveyance: Equity: Practice.

1. C. entered into an executory contract with L. for the purchase of certain lots. Before the entire consideration was paid he sold part of the lots to R. and gave him a contract for them, receiving part

cash and part notes in payment. Each note referred to the lots as the consideration. At the same time C. orally promised R. to apply his payments on the contract with L. Before maturity of the notes C. transferred his interest in both contracts to K., who agreed to carry out C.'s promise as to the application of payments. K. afterwards transferred both the contracts and the notes to N. as collateral. Upon learning of this transfer R. refused to pay the notes unless N. would agree to comply with C.'s promise. N. promised accordingly, and part of the notes were paid, but the money was not applied as agreed. *Held*, that R., as against N., had the right to have the money already paid, as well as that remaining due, applied upon C.'s contract with L., and that N. could not recover the final balance due on the notes without tendering a conveyance of the lots.

2. In an action against R. on the notes, his answer admitting the indebtedness and offering to pay the amount due upon receiving a proper conveyance raised an equitable issue only. A special verdict was therefore advisory merely, and the court should have made the usual findings, but in their absence the verdict will be treated as a finding, and judgment ordered upon it and the undisputed evidence.

APPEAL from a judgment of the superior court of Douglas county: O. B. WYMAN, Judge. *Reversed.*

The action was brought to recover upon two several promissory notes, for $625 each, made by the defendants to one L. L. Cloyd, and indorsed by Cloyd to one J. C. Kennedy, and by Kennedy to the plaintiff. The history of the transactions out of which the controversy arose is as follows:

Cloyd bargained for four lots, in the city of Superior, with the Land & River Improvement Company. He had a written contract for the lots, and had erected a good building on two of them. There remained unpaid of the purchase price of the four lots the sum of $4,500. He sold the two unimproved lots to the defendants for the price of $4,500, the sum unpaid on his contract, and gave the defendants his contract for them. Two thousand dollars was paid down, and the balance left to deferred payments. It was agreed orally that the money to be paid by the defendants

should, as paid, be applied by Cloyd on his contract with the Land & River Improvement Company. The payments were made to become due at the same time payments became due on Cloyd's contract, and negotiable promissory notes, maturing at the same dates, of which the notes in suit are two, given collateral to the defendants' contract. Cloyd afterwards sold his interest in both contracts to Kennedy, and transferred the notes, before maturity, with the contracts, to him. Kennedy agreed to carry out Cloyd's promise to the defendants, to apply all moneys paid by them to the Land & River Improvement Company, on the contract. Kennedy afterwards borrowed money from the plaintiff, and, for security, transferred both the contracts and the promissory notes to the plaintiff. It was a controverted question in the case whether the plaintiff knew of the arrangement whereby the money was to be paid to the Land & River Improvement Company, and assented to it, at the time when it received the notes. The jury found for the plaintiff on that issue. But, when the defendants learned that the contracts and their notes had been transferred to the plaintiff, they refused to pay, unless the plaintiff agreed to comply with the promise of Cloyd in reference to the application of the money paid. The plaintiff agreed to perform Cloyd's undertaking, and to so apply such payments as should be made. Payments were made, but were not applied on the contract of the Land & River Improvement Company. The defendants refused to make further payments, hence the action. It was a principal contention at the trial whether the plaintiff agreed to make such application of moneys paid by the defendants on these notes, and that issue was found by the jury in favor of the defendants. The jury also found that the bank had no knowledge of the promise of Cloyd in reference to the application of the moneys paid by them at the time when it received the notes as such security. There remains unpaid on defendants' con-

tract with Cloyd upwards of $1,300. There remains unpaid to the Land & River Improvement Company above $3,000. They have no credit upon the contract for the money which they have already paid. They have offered to pay the balance unpaid on this contract with Cloyd, and the notes, on condition that the lots mentioned in the contract be conveyed to them. The position of the plaintiff is that it is in no way responsible for the conveyance of the lots, but is entitled to recover the amount of the notes, irrespective of such conveyance; that the oral contract with Cloyd has no relation to, or influence upon, its rights. Cloyd and Kennedy are both insolvent.

Both parties moved for judgment upon the special verdict. The defendants' motion was denied, whereupon they moved for a new trial, which was denied, and judgment was rendered for the plaintiff for the amount of the notes, from which the defendant *Ramsey* appealed.

Victor Linley, for the appellant.

For the respondent there was a brief by *Ross, Dwyer & Hanitch*, and oral argument by *W. D. Dwyer*.

NEWMAN, J. No doubt, the defendants, as between themselves and Cloyd, had the right to require all payments made on their notes to be applied upon the contract of the Land & River Improvement Company, in reduction of the unpaid purchase money of the lots, and, on complete payment, to require a proper conveyance. Final payment could not be enforced against them until Cloyd should have been prepared and ready to deliver a proper conveyance. Nor could the defendants require a conveyance until they had paid, or were ready to pay, the full purchase money. Kennedy, by express agreement, stood in Cloyd's place. There is no dispute that he agreed to carry out Cloyd's undertaking in regard to the application of moneys paid by the defendants on their notes. It was in dispute whether the plaintiff took the notes under

a similar agreement, or with notice of the defendants' equities, in that regard. Both land contracts were transferred to the plaintiff along with the notes. Each note contained these words and figures: "Value received, lots 1 and 2, block 217, Ninth division, West Superior." The contracts covered the same lots. If not notice itself, these facts furnish some evidence of notice. It would, at least, suggest to ordinary minds the inference that the notes were related to the payments stipulated in the contracts. At the time when the first notes became due, and before their payment, the defendants raised the question, and refused to pay unless the plaintiff should promise to apply the money paid to the payment of the purchase price of the lots, as Cloyd had promised to do. The plaintiff, with such evidence of the defendants' rights in the premises in its possession, agreed to do just what Cloyd had agreed to do, to have the money applied on the contract of the Land & River Improvement Company. It voluntarily put itself in Cloyd's place as regards the application of these moneys. This may be viewed in either of two ways,— either as a compromise, or as an admission. If the right to have the moneys so applied was really in doubt and in dispute between them, then it was a compromise. If it was not in dispute, it was clear admission of the right, and strong evidence of previous notice of it. That the plaintiff did make such promise, and obtained part of the amount of the notes on the faith of it, is established by the verdict. So, it may fairly be deemed that the defendants have the right, as against the plaintiff, to have both the money which they have paid, and which they shall pay, upon the notes, applied upon the land contract of Cloyd with the Land & River Improvement Company.

This, in effect, puts the plaintiff in the place in which Cloyd stood before his transfer to Kennedy. It has the same rights, and is subject to the same obligations. Cloyd could not have recovered this final payment of purchase

money on the defendants' contract with him, unless nor until he was prepared and offering to perform on his part by delivering a proper conveyance of the lots. The obligation of the parties to such contracts is reciprocal. The vendor cannot recover the final balance of purchase money until he has tendered or is ready to make proper conveyance. The vendee cannot require a conveyance until he has tendered and is offering to make payment of the full purchase money. If either party require it, the final payment and the delivery of the conveyance must be concurrent acts. Pomeroy, Cont. (2d ed.), § 361, and cases cited in notes.

It was not controverted on the trial that the defendants had offered to pay to the plaintiff the full amount unpaid and due upon the Cloyd contract, on condition that it would procure and deliver to them a proper conveyance of the lots, and that it had refused and disavowed all obligation to do so, or to apply the payments to that purpose. This is one of the facts which are determined in the action, although not found by the verdict; for the trial, although in form by a jury, was really by the court. The only issues in the case arose on the equitable defense. There were no legal issues to be tried. The verdict was advisory merely. There should have been the usual finding by the court. The trial court evidently treated the special verdict as its finding, and based its judgment on it. A special verdict is insufficient to support a judgment, unless it finds all the facts which are essential to a recovery in favor of the prevailing party. The same rule is applicable to findings. *Bates v. Wilbur*, 10 Wis. 415. This verdict, treated as a finding, fails to find in the plaintiff's favor this essential fact of a tender or readiness to perform on its part. On the contrary, an uncontroverted fact is established, and is to be treated as part of the finding (*Murphey v. Weil*, 89 Wis. 146), that the plaintiff has disavowed its obligation to perform. So the finding not only

fails to establish the plaintiff's right to recover, but establishes affirmatively that it has no right to recover.

By the Court.—The judgment of the superior court of Douglas county is reversed, and the cause is remanded with direction to render judgment for the defendants.

WILSON, Respondent, vs. BURHANS, Appellant.

May 25—June 11, 1897.

Mortgages: Conversion: Frivolous answer.

A mortgage while outstanding as security for the indebtedness evidenced by promissory notes, is not properly subject to conversion to the mortgagor's damage. An answer in an action on the notes which admitted the indebtedness and set up a counterclaim for the conversion of the mortgage was therefore properly stricken out as frivolous.

APPEAL from a judgment of the superior court of Douglas county: CHAS. SMITH, Judge. *Affirmed.*

This action was commenced to recover of the defendant on two past-due promissory notes of $175 each, with interest at the rate of ten per cent. per annum, on one from the 1st day of February, 1896, and on the other from the 1st day of August, 1896. The notes were dated the 1st day of August, 1894, and were made and given to Frank J. McLean, who, for value, before the commencement of this action, assigned them to the plaintiff, who was at the time of such commencement the lawful owner and holder thereof. The foregoing facts were set forth in the complaint by appropriate allegations. The defendant answered, admitting such plaintiff's causes of action, and for a counterclaim alleged that he gave to the payee of the notes, F. J. McLean,

a mortgage upon some real property to secure the payment thereof; that such mortgage was assigned by such payee to plaintiff; that it was of the value of $5,000; that neither the payee of the notes nor plaintiff had accounted therefor; that plaintiff had converted said mortgage to his own use; and that defendant claimed the value thereof, to wit, $5,000, as a counterclaim to plaintiff's causes of action,— and demanded a judgment therefor, less the amount due on the notes declared on in the complaint. The court struck out the answer, on motion, as frivolous, and ordered judgment in plaintiff's favor according to the demand of the complaint. Judgment was rendered accordingly, and defendant appealed.

For the appellant the cause was submitted on the brief of *Knowles & Wilson.*

Francis H. De Groat, for the respondent.

MARSHALL, J. Fairly construed, the allegations of the counterclaim state as facts that defendant gave a real-estate mortgage to secure the payment of the note sued on, that the mortgage came into the possession and ownership of plaintiff with such notes, and that he retained the same notwithstanding the action at law to recover the indebtedness. The allegation that the plaintiff had not accounted for the mortgage, but had converted the same to his own use, obviously means no more than indicated. That plaintiff had a right to retain the mortgage, and proceed at law to collect the indebtedness, requires no discussion. The mortgage, while outstanding as security for the indebtedness evidenced by the notes, did not constitute property subject to conversion, to defendant's damage, by plaintiff or any one else. Defendant had no property, strictly so called, in the mortgage. It had no value independent of the indebtedness it was given to secure. Upon payment of such indebtedness the mortgage would become valueless, and defendant would be entitled to have it discharged; and the remedies to that

end are ample, but an action to recover the mortgage, as property, or its value, is not one of them. The answer clearly did not show facts sufficient to constitute any defense or counterclaim to the causes of action set forth in the complaint. It was clearly frivolous, and was properly stricken out as such.

By the Court.— The judgment of the superior court is affirmed.

CLARKE, Respondent, vs. GERMAN BANK OF SHEBOYGAN and another, Appellants.

May 26 — June 11, 1897.

Debtor and creditor: Husband and wife: Fraudulent conveyance.

In an action by a married woman to remove, as a cloud upon her title to land which had been conveyed to her by her husband, an execution levied thereon under a judgment against the latter upon the theory that his conveyance to his wife had been made with intent to hinder, delay, or defraud his creditors, a finding that the plaintiff was the *bona fide* owner of the land is *held* not to be against the clear preponderance of the evidence.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

This was an action brought by plaintiff to enjoin defendants from selling certain real estate, which she claimed to own, on execution issued on a judgment against her husband, alleged to be void, and to remove the cloud from her title to such real estate created by such judgment and pending efforts to enforce the same as a lien thereon. The answer put in issue the allegations of the complaint regarding the invalidity of such judgment, and the *bona fides* of plaintiff's claim of title to the real estate, and counterclaimed that the title to the real estate was placed in the name of plaintiff by

her husband for the purpose of hindering and delaying his creditors. Defendants prayed for judgment that the title to the lands, as to the creditors of plaintiff's husband, was in him, and for a sale thereof for the payment of the judgment plaintiff sought to restrain the enforcement of as a lien thereon. Plaintiff replied to the counterclaim. The cause was tried by the court and findings filed, in substance, as follows:

(1) When the action was commenced, and for some time prior thereto, plaintiff was the owner and in possession of the lands described in the complaint, situated in Milwaukee county, Wisconsin.

(2) June 22, 1895, a pretended judgment was rendered in the circuit court for Sheboygan county, Wisconsin, in favor of the defendant bank and against William Clarke (husband of plaintiff), for $21,665.55, which judgment was docketed July 3, 1895, in Milwaukee county, Wisconsin.

(3) Such proceedings were thereafter had that the aforesaid land was advertised for sale on execution issued on such judgment, and proceedings in that regard were pending at the time this action was commenced.

(4) Plaintiff was the *bona fide* owner of said land, and the proceedings to sell the same cast a cloud upon her title thereto.

(5) February 17, 1890, plaintiff's husband owned an eighty-six-acre farm in Milwaukee county, Wisconsin, worth $18,500, which included their homestead, valued at $13,000; and on that day the husband, for a nominal consideration, conveyed said farm to plaintiff. The conveyance was not made in contemplation of any indebtedness to be thereafter incurred by him.

(6) February 11, 1890, William Clarke subscribed for $17,000 of stock in the Sheboygan Electric Light Company, which stock he thereafter fully paid for. At the date of such subscription he was not indebted to the defendant bank, or any other person, in any sum whatever.

(7) May 5, 1890, plaintiff and her husband joined in a note and mortgage on the farm to one Klann, by which they procured a loan of $10,000, which the husband paid into the corporation on his aforesaid subscription to stock. The said corporation was not then indebted to the defendant bank. In consideration of plaintiff joining in the mortgage, her husband turned over to her $3,700 worth of personal property on the farm.

(8) In 1890 plaintiff sold the personal property for $3,700, and the farm for $8,500. Thereafter she invested the proceeds of such sales and the accumulations thereof, together with $3,000 of borrowed money, in the property described in the complaint, and improvements thereon. After the purchase of such property, one tract of the land was used as a homestead, and the rest was rented, the income going to plaintiff as her separate property.

(9) The judgment in favor of the defendant bank, mentioned in the complaint, was entered in proceedings under the statute to wind up the aforesaid corporation as insolvent, to sequestrate its property and distribute the same among its creditors. In the action judgment was rendered for such sequestration, also for the appointment of a receiver; the amount due to the aforesaid corporation from said William Clarke, as a stockholder, was adjudged and determined, and thereafter, without notice to him, judgment was rendered against him in favor of the defendant bank for its *pro rata* share of the amount due to such corporation from him. The judgment mentioned in the complaint is the judgment so entered, and it is void as in excess of the jurisdiction of the court.

As a conclusion of law, the court found that the plaintiff was entitled to judgment as prayed for in the complaint.

Exceptions were filed to raise the questions discussed in the opinion. Judgment was rendered in accordance with the findings, and defendants appealed.

For the appellants there was a brief by *Francis Williams* and *Krez, Kellogg & Krez*, and oral argument by *H. L. Kellogg*.

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *T. W. Spence*.

MARSHALL, J. A careful consideration of the evidence in this case satisfies us that the findings of fact made by the trial court in regard to the claim of fraud insisted on by defendants cannot be disturbed as contrary to the clear preponderance of the evidence. Therefore it is unnecessary to consider any other question on this appeal. With such findings standing as a verity in the case, the conclusion of law to the effect that the judgment against plaintiff's husband is void is not material, for defendants' case fails before reaching that point. It is not deemed necessary, ordinarily, when a conclusion is reached that a finding of fact made by the trial court cannot be disturbed under the rules governing that subject, to incumber the opinion by a long statement and discussion of the evidence, and no reason is perceived why that should be done in this case.

By the Court.— The judgment of the circuit court is affirmed.

REINHARD, Respondent, vs. REINHARD, Appellant.

May 26 — June 11, 1897.

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Divorce: Cruel and inhuman treatment: Final division of property: Judgment.

1. In an action for a divorce, evidence showing, among other things, that the husband lived and slept in the same house with his wife, and ate at the same table food prepared by her, without speaking to her except in anger for a period of three months, is *held* sufficient to warrant the granting of a decree on the ground of cruel and inhuman treatment.

2. A mere conclusion of the trial court, in a divorce action, to make a final division of the property of the husband, and a reference to take proofs and recommend a proper division, do not constitute a final division within the meaning of sec. 2369, R. S., prohibiting the making of other provisions for the wife in the future when the property has been finally divided.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Modified.*

C. W. Briggs, for the appellant.

W. J. Turner, for the respondent.

CASSODAY, C. J. This is an action for divorce, on the ground of cruel and inhuman treatment, otherwise than by personal violence. The answer consists of admissions, denials, and counter allegations, and, among other things, that the plaintiff had fallen in love with some other person.

At the close of the trial, the court found, as matters of fact, in effect, that both parties were residents of Milwaukee, and had been since 1890; that they were married July 28, 1880; that there was no issue of such marriage; that the allegations in plaintiff's amended complaint as to cruel and inhuman treatment were proven and true; that the defendant was guilty of the cruel and inhuman treatment charged in the complaint, practiced otherwise than by personal violence; that the property of the defendant was so situated that it was to the best interests of the parties that there should be a final division of the defendant's estate between the plaintiff and the defendant; that the court was not then sufficiently advised by proofs as to the value of the defendant's estate or the division thereof which ought to be made. Among the allegations of the complaint so found to be true are those to the effect that, for a very long time before the commencement of the action, the defendant treated the plaintiff in a cruel and heartless manner, and with utter indifference and neglect; that about six years before, in a fit

of anger, he struck her; that in June, 1895, he raised his hand in a threatening manner, as if to strike her, and said that, if she had not then cause for divorce, he would give her cause, and drove her out of the house; that he was of a sullen and morose disposition, and for three months prior to May, 1894, refused to speak or communicate with her, but ignored her entirely; that the plaintiff, having saved a little money, and believing that separation for a short time might restore affection, went to Germany, and remained there from May to September, 1894; that, upon her return, he, for about four weeks, treated her kindly, and then again commenced to treat her with indifference and to ignore her entirely, and refused to speak to her or communicate with her, and did not speak to her until May, 1895, although the plaintiff and defendant lived in the same house and ate at the same table, the plaintiff preparing the morning meal, the others being taken at a boarding house; that such treatment was so notorious that it was observed by others, and caused the plaintiff great sorrow, shame, and disgrace, and at one time so depressed her that she attempted to commit suicide; that, by reason of such treatment, plaintiff had lost affection, regard, respect, and esteem for the defendant, and could no longer remain in the same house with him; that the plaintiff's health had been ruined by such treatment.

And, as conclusions of law, the court found, in effect, that the plaintiff was entitled to judgment of divorce, and ordered the same accordingly, and thereupon referred the case to a court commissioner, to take proofs of the value of the defendant's estate and report the same to the court with his recommendation as to the division proper to be made between the parties, and that, upon the coming in of the report, a further decree would be entered making division of said property, as to the court it might seem just and proper. Upon such report being made and hearing had, the court modified the same and its findings, so as to allow the plaintiff to have

and recover from the defendant alimony, instead of a division of the estate. The report was otherwise confirmed. The court found that $50 per month was a fair and reasonable sum for the defendant to pay the plaintiff as permanent alimony, to commence October 22, 1896; and that the defendant be required to secure the payment thereof by bond, with sureties to be approved by the court, conditioned for the payment thereof on the 1st day of each and every month; and that the defendant pay to the attorneys of the plaintiff $350 as attorney's fees, in addition to the attorney's fees to be taxed in the action; and ordered judgment accordingly; and, from judgment so entered, the defendant brings this appeal.

The evidence as to cruel and inhuman treatment is not as pronounced and tangible as would naturally be expected in such a case, but, after careful consideration, we are constrained to hold that the findings of the trial court in that respect are sustained by the evidence. Marriage implies companionship, and is supposed to be based upon mutual regard and affection. For a husband and wife to live and sleep in the same house, and eat at the same table food prepared by the wife, without the husband speaking to the wife, except in anger, for a period of three months at a time, must have been, at least, very disagreeable, if not unbearable. That such was the fact does not seem to be very seriously disputed. It certainly evinced abnormal affections, persistent wantonness, and deliberate perversity. The effect of such conduct upon a nervous, sensitive woman can better be imagined than described, and may have seriously impaired the plaintiff's health, as found by the court. This court has repeatedly held that personal violence, whether actual or threatened, or even gross and abusive language, is not absolutely essential to constitute cruel and inhuman treatment. *Freeman v. Freeman*, 31 Wis. 235; *Crichton v. Crichton*, 73 Wis. 59; *Wachholz v. Wachholz*, 75 Wis. 377;

Hacker v. Hacker, 90 Wis. 325. We cannot hold that the divorce was improperly granted.

It is true, as contended, that when the husband's estate, in such a case, is finally divided, no other provision can thereafter be made for the wife. R. S. secs. 2364, 2369. But no such final division was ever made in the case at bar. The mere conclusion to so finally divide was subject to such change and modification as the trial court might make, prior to the time of the entry of the judgment thereon. We have concluded, however, to reduce the permanent alimony from $50 per month to $25 per month.

By the Court.—That part of the judgment of the circuit court so allowing $50 per month is reversed and modified so as only to allow $25 per month, but the judgment in all other respects is affirmed; the taxable costs of this court to be paid by the defendant.

COLE and another, Appellants, vs. GETZINGER and others, Respondents.

March 17 — June 24, 1897.

Equity: Setting aside conveyance of land: Fraud: Presumption arising from situation of parties: Evidence: Practice: Parties: Notice.

1. Where a man eighty-eight years of age, nearly blind, and feeble in mind and body, conveyed away his farm which constituted all his property for much less than its real value, without making provision for his own support, and his daughter and her husband, with whom he lived, participated in the transaction and received a large part of the proceeds to the exclusion of other children, who had claims on his bounty and were not notified of the proposed sale, it will be presumed that the transaction was fraudulent, and equitable relief will be granted unless such presumption is rebutted, even though the evidence is insufficient to establish actual fraud.

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2. In an action by the defrauded heirs to set aside such a conveyance the grantor was not shown to have taken part in the negotiations, or to have ever authorized them or known anything about them until the notary came to execute the conveyance. Letters written to and by the son-in-law and claimed to be an important part of the negotiations had come into possession of one of the defendants who had acted as agent for the purchasers, but he had failed to produce them in response to a subpœna *duces tecum*. It was not shown that the grantor had been informed of the contents of such letters, or that he had directed anything to be written in reply. The notary who drew up the papers knew nothing about the negotiations or the bargain, and his testimony did not show that the transaction was fair and free from undue influence. *Held*, that the presumption of fraud arising from the nature of the transaction and the relation of the parties had been strengthened rather than rebutted.
3. A court of equity, having obtained jurisdiction in a suit by the defrauded heirs to set aside such a conveyance, will not dismiss the action because the specific relief asked has become impracticable and the only alternative relief possible is mere compensatory damages, but will retain and decide it and decree the payment of such damages.
4. One of the heirs, who had been made a defendant and had answered admitting the truth of the complaint and claiming the same relief as the plaintiffs, will be regarded as a plaintiff and given relief as such.
5. R., who had undertaken to purchase land for G., obtained a conveyance thereof to a third person for $3,000, through fraud and undue influence, and immediately caused it to be conveyed to G. for $4,200, R. retaining the difference. *Held*, that G. was not chargeable with constructive notice of the fraud, since R.'s relation to the subject matter was such as would induce him to withhold the facts from G. G. was, therefore, a *bona fide* purchaser, and the conveyance to him could not be set aside.

APPEAL from a judgment of the circuit court for Jefferson county: JOHN R. BENNETT, Circuit Judge. *Affirmed in part; reversed in part.*

This action was brought to set aside a deed of conveyance of a certain farm, containing about seventy-five acres, in the town of Herman, Dodge county, made by Ira S. B. Cole, November 22, 1892, to the defendant *Alice Farmer*, on the

ground that it was procured through fraud, undue influence, and want of capacity of the grantor. On the 29th of the same month, *Alice Farmer* conveyed the same premises to the defendant *Peter Getzinger*. At this time the grantor, Ira S. B. Cole, was living with the defendants *Cassius M. Moody* and *Betsey C. Moody*, his daughter; and his son *Ira B. Cole*, one of the plaintiffs, was occupying the premises as a tenant under his father. Ira S. B. Cole died intestate, March 17, 1893, leaving five heirs at law, two of whom (*Ira B. Cole* and *Sabra J. Kaiser*) joined in bringing this action, making the others (said *Betsey C. Moody*, *Edwin Cole*, and *Charlotte Losee*) defendants, as their consent to join as plaintiffs could not be obtained.

It was alleged, in substance, that the farm was worth $5,500 at the time, and that Ira S. B. Cole was about eighty-eight years of age, nearly blind, and very infirm and feeble, and was mentally incompetent to transact business or guard or protect his interests; that the defendants *Cassius M. Moody*, *Betsey C. Moody*, *R. W. Roberts*, *Alice Farmer*, and *Peter Getzinger* conspired together to defraud him of his farm, and to procure a deed thereof for half of its value, and appropriate the proceeds thereof to the use of said *Moody* and wife, and divide the profits between the defendants *Roberts* and *Getzinger*,— the deed to be taken to the defendant *Alice Farmer*, a member of the family of said *Roberts*, who was to convey the land to *Getzinger;* that the consideration for the deed to said *Farmer* was to be $3,000, and of the deed from *Farmer* to *Getzinger* $4,200; that said $3,000 was to be paid out of the money received from *Getzinger*, and the remaining $1,200 was to belong to said *Roberts*.

The complaint alleges, in substance, the execution of said scheme, and that the deed was procured by the fraudulent, undue, and unlawful influence of said *Moody*, and that the grantor was induced to give said *Moody* $500, and his wife, *Betsey C.*, $2,000, of the purchase price of $3,000, and *Rob-*

erts received and retained to his own use $1,200 of the $4,200 in fact paid by *Getzinger* for the farm; that the said Ira S. B. Cole had no other property than this farm; that no agreement or provision in the transaction was made for his support; and that no notice of said proposed transaction had been given to his other relatives; and the plaintiffs asked judgment that the deed from Ira S. B. Cole to *Alice Farmer*, and also the deed from *Farmer* to *Getzinger*, should be set aside and canceled, and, if the land should be beyond the reach of the decree, that the defendants account for two fifths of said moneys paid by said *Getzinger* for the farm, and for general relief.

The defendants *Moody* and wife, in their answer, admitted the age of Ira S. B. Cole, and that he had lived with them more than sixteen years; and averred that they had no knowledge or information sufficient to form a belief as to the value of the land, the deeding of it to *Getzinger*, the appropriation of $1,200 by *Roberts*, or that no notice of said negotiations or transactions had been given to others of his relatives; and alleged that the sale of the land was not made at their instigation, but one Nevitt was, at said Cole's request, called on to prepare the deed, and that they in no way influenced or controlled anybody in the matter; and they claimed that the $2,500 received by them was no more than a fair compensation for the care and support of said Cole, and for *Betsey C. Moody's* fair share of his estate. The defendants *Roberts*, *Farmer*, and *Getzinger*, in their answers, after admitting that Cole was eighty-eight years of age, and lived with the *Moodys* many years, that he died March 20, 1893, intestate, and that he deeded the land to *Alice Farmer* and she deeded the same to *Getzinger* for $4,200, averred a want of knowledge or information sufficient to form a belief as to all other matters. *Getzinger* claimed, in his answer, to have purchased the land from *Alice Farmer* in good faith, for a valuable consideration, believing she had a good title thereto.

The defendant *Charlotte Losee*, one of the claimant heirs, admitted the truth of the complaint, and claimed the same relief demanded by the plaintiffs.

At the trial evidence was given by six farmers residing near the land that it was worth, at the time the deed was made, $75 to $80 per acre. Evidence was given showing the death of Ira S. B. Cole intestate, and that his heirs were as stated; that he had lived with the defendants *Moody* and wife fourteen years before his death; that one of the plaintiffs (*Ira B. Cole*) was living on the premises at the time the deeds in question were made, as the tenant of his said father, and he had no notice that any transfer was to be made, and two others of his daughters (*Mrs. Kaiser* and *Mrs. Losee*) lived near him; that he first learned of the conveyance December 1, 1892, from *Getzinger*.

The defendant *Betsey C. Moody* testified that neither she nor her husband had any agency for the sale of the land; that her father executed the deed at their house; that she never saw *Alice Farmer*, and she was never at their house, and that her father never saw her during the negotiations; that her father conducted the negotiations. "I suppose he sold the property. I didn't hear anybody make any bargain with him. I know that *Roberts* wrote a letter to him in regard to it. I don't know of any one conducting the negotiations except *Roberts*. *Mr. Roberts* never saw father about it. There wasn't anybody that ever saw father. I know *Roberts* bought the land. He came to the house, but I don't know how long before he bought the place. He did not see father, or ask to see him, as he was lying down for his afternoon nap." She further testified that she wrote letters to *Roberts* about the sale of the farm,— did not know, could not tell, how many; could not make an estimate. "*Roberts* wrote father about it. All of father's letters came in my husband's name; were directed in his name." Further, that she couldn't tell how many there were; that she had no

copies of them; that the letters were given by her husband to *Roberts* about the time the suit was commenced against *Getzinger* for trespass; that she was not in the room when the deed was executed to *Alice Farmer;* that $2,000 of the $3,000 for which the land was sold — being at the rate of $40 per acre — was given to her, and $500 to her husband, in bank checks, because he had lived with them so many years; that he said it was for his care and support; that she did not ask him for it, and there never was any arrangement that he should pay for his board.

The defendant *Cassius M. Moody* testified that he did not conduct any negotiations for a sale of the property; that he had a conversation with *Roberts* about it after he had received a letter. "He asked what I wanted for my farm. I told him I didn't own any farm; that the farm belonged to Father Cole; and that was all that was said about the farm. Saw him again in Oshkosh, but don't remember anything about the conversation we had. Had a communication from him between these times, and met him several times, but don't remember any conversation we had except the first time." He testified having given *Roberts* all the correspondence in regard to the farm.

Plaintiffs' counsel here called on *Roberts* to produce these letters, in response to a subpœna *duces tecum* served on him eleven days previous, and the said *Roberts*, being sworn, testified that he received the letters written by him to *Moody*, and that, if he had them at all, they were at his office, 200 miles distant, in Shawano county; that he had not seen them for over two years; that he had some one in possession of his office, running the bank, but did not know where the letters were; had not made any examination to see; had not written to his clerk; and had taken no steps to try to get them under the subpœna. Plaintiffs applied to the court for an attachment against *Roberts*, to compel production of the letters. The court refused the application. Plaintiffs

applied to strike out the answer of *Roberts* for not producing them, but it was refused.

C. M. Moody further testified: That Roberts did not see the old gentleman Cole at all during the negotiations, to his knowledge. "All the talk he had up there about it was with me, except the letters he wrote." That he (*Moody*) was not present when the deed was executed. That he paid back $80 of the purchase money to *Roberts*, but not out of the $2,500 given to himself and wife. "This was for a shortage of land, and *Roberts*' expenses. His exact words to me were: 'Take the certificate, and draw the money from the bank, and pay *Mr. Roberts* whatever he asks.' No sum was named." That he afterwards told him he had paid *Roberts* $80, and did not remember that he said anything. That the sale was consummated, the deeds delivered, and money paid over, without any notice, so far as he knew, to any one of the old gentleman's relatives.

It appeared that *Alice Farmer* did not buy the land, or pay anything for it, and had no interest in the transaction, but took the deed and executed a conveyance to *Getzinger* at the request of *Roberts*.

The defendant *Getzinger* testified: That he had two conversations with *Roberts* before he got the deed from *Alice Farmer*, in the first of which *Roberts* told him his farm was hardly large enough, to which he replied that he knew no neighbor who would sell unless Mr. Cole. That *Roberts* said he would go up that or the next week, and would see if Grandpa Cole would sell, and he asked him what he thought the property worth, and he answered that to him it was worth $4,000, and that was all he would give for it. That it was understood that he should go up and buy the land for him at $4,000. That he did not see *Roberts* after that, until he came and told him he could have the land for $4,200. That he came to his place two days before he got the deed, and said he would like to have him buy the land at $4,200. That

he told *Roberts* he would give the amount, but everything must be clear, and did not say anything further. That he said nothing to either old man Cole's son or daughter, living near him, about buying their father's land, until after he got the deed. *Roberts* said that Mr. Cole said he did not want it to get around much that he had sold the place, and that Cole wanted the money, and to get it as soon as possible, and he got it as soon as he could. That he paid *Roberts* $1,200 at his house, and he gave him the deed from *Miss Farmer*, and then he told *Roberts* that he thought that he (*Roberts*) bought it. That *Roberts* said that made no difference to him. That he did not ask why she bought it, and then sold it right off, nor why they placed in the deed "one dollar and other valuables" as the consideration. That he came to the bank with *Roberts*, and then he paid the $3,000 to the bank, and got the deed from Cole to *Alice Farmer*.

Roberts, being recalled, testified: He never had any conversation with the old man Cole about the purchase of the property, and that his only negotiations were with *Mr. Moody*. "Knew the old man Cole all my life, and that his age is eighty-eight, I believe." He went to the office of Nevitt, the notary who prepared the deed, alone, and wrote how he wanted the deed drawn. It was sent to the bank to collect $3,000, and was not in his possession until *Getzinger* paid that amount to the bank for the deed, and that he put the other $1,200 in his pocket. During the negotiations he said nothing to Ira B. Cole, nor any of the old gentleman's relatives, except *Mr.* and *Mrs. Moody*, and never informed the *Moodys* or old gentleman Cole that *Getzinger* was buying, or that more than $3,000 could be received for the land.

Passages from two letters, written November 1, 1892, and November 11, 1892, by the defendant *Betsey C. Moody*, to relatives, to which she signed her husband's name, were read in evidence, as follows: "Grandpa is about the same. He don't know anybody when they first come here. I can see

he fails slowly." "Grandpa has got so he cannot see to help himself at the table, or find anything he wants. He didn't know Uncle Will when he came here." One witness testified that in November, 1892, he noticed the old gentleman was very weak; that sometimes he would not know him; that he "would ask who I was, after I had talked in his presence so that he could hear me. *Mrs. Moody* prepared his food for him at the table. If questions were asked him, sometimes he would answer, and sometimes not. He seemed to be in bed most of the time." Witness thought he was not competent to transact business. Another witness testified that in November he appeared to be weak physically and mentally, and at times "I should say he didn't know his friends;" that when witness went there he thought he did not recognize him, and made no answer when he spoke to him. Another, who was at *Moody's* four months from December 3, 1892, testified to seeing the old man every day; that he was quite feeble; did not prepare his food at the table; did not always recognize his friends when they came in; sometimes, after his friends had conversed in his presence, he would ask who they were; when they went away from home, they had to leave him alone sometimes, locking the house; sometimes he went to bed, and sometimes staid in the chair; that was their custom when they went away. Two of his grandsons testified to having visited him in the spring of 1892, and that the old gentleman did not seem to know them, and to having tried to converse with him, but he did not seem to take any notice of it. At the close of the plaintiffs' testimony, on motion, the court dismissed the action as to the defendant *Getzinger*.

Five witnesses residing in the vicinity testified for defendants that the farm was worth from $55 to $60 an acre. Dr. H. B. Dale testified that he was acquainted with the mental capacity of Ira S. B. Cole in the fall of 1892, and previous thereto, to a certain extent; that his mental capacity was

good; that he did not remember just the date, but thought he saw him during the year 1892; when he last saw him he was not blind; did not remember when he last went to see him. Dr. Titus testified that he was somewhat acquainted with Ira S. B. Cole, but had never doctored him very much; that he was an old man, was infirm, and his mental capacity was somewhat in keeping with his infirm age, but he seemed to know him every time he went there, and seemed to be generally posted as to things that were transpiring, and conversed with him in regard to things that he supposed interested him. He last saw him the 2d of December, 1892. "*Mr. Moody* asked me whether I thought his father-in-law was of sound mind. I know we talked the matter over considerably; . . . I questioned him to see what his memory was, and to see how he could remember the names of his family, etc. He seemed to answer all right, and I judged from that that he was in mind as people are at that age, and of such infirmities as he had. He was feeble." Another witness testified he was acquainted with Ira S. B. Cole, and saw him frequently in 1892, and talked with him on different subjects; that he never saw anything but that he was of sound mind; never saw any change in him in the thirty-nine years that he had known him.

C. R. Nevitt, the notary who prepared the deed, testified: That his mental condition and capacity was good for an old man. That he was aware of what he was saying and doing. That he drew up the body of the deed, and it was executed at *Moody's* residence, his wife being present. "When I got there, I pulled out the paper, and said: 'Mr. Cole, you have sold your farm, I understand?' He replied, 'Yes, sir; I have sold my farm.' 'Shall I make the deed,— finish the deed?' 'Yes, sir.' And some information was given me by which I got the description. I entered it in the blank, read it over to him, and my memory is that he objected to some little part of it that it was not quite perfect to his idea, and that

some slight alteration was made. He signed it. The deed was acknowledged and witnessed there at that time; and that is all. *Mrs. Moody* was present, and *Mr. Moody*, when we first began, but he left the room before it was completed, and afterwards returned. After the deed was finished, I asked him, 'What are you going to do with your money?' He pointed to his daughter *Mrs. Moody*, sitting on the lounge, 'I give her $2,000.' 'What for?' 'Because she has taken care of me these many years.' And then *Mr. Moody* came in. The old gentleman looked up at him, and says: 'And *Cassius*, I will give you $500. You have done your share towards my care.' And he replied, 'Father, I should have taken just as good care of you, if you had not.' Mr. Cole replied: '*Cash*, take money when you can get it. You can't always get it.' This was the substance of all that was said." That he was in a hurry to return. He also testified to directions given to *Moody* by Cole to have the deed sent on, so he could get the money, and to get one certificate of $2,000 for *Mrs. Moody*, and one of $500 for *Mr. Moody*, and the balance for himself. That the deed was forwarded accordingly through the bank at Oshkosh to the bank at Hartford, and he purchased with the proceeds a certificate for *Mrs. Moody* of $2,000, and one of $500 for *Mr. Moody*, and one of $497 for Mr. Cole. That "at all these times the old man knew perfectly what he was doing, and his mental condition was good." There was nothing said of any other price than $3,000.

Mrs. Nevitt testified to having known Mr. Cole for fifteen years or more, and he acted just as he always acted, except he did not talk quite so much. When he did talk, he seemed to understand what he was talking about as much as ever he did, and such was his condition the day the deed was executed. His eye-sight had failed him somewhat. His general health had failed him the same as any old gentleman.

The court found that Ira S. B. Cole deeded the land to

defendant *Alice Farmer* without any fraud on her part or the part of defendants *Peter Getzinger*, *Cassius M. Moody*, *Betsey C. Moody*, and *R. W. Roberts*, or either of them; that said *Roberts* purchased said land of said Cole for $3,000, having made an arrangement to sell it to *Getzinger* for $4,200, but that he practiced no fraud, directly or indirectly, on said Cole, or in selling the land to *Getzinger*, and that there was no conspiracy between any of the defendants *Getzinger*, *Roberts*, *Farmer*, or the *Moodys*, or either of them, to induce Cole to sell and deed said land; that said Cole was of sound mind, and competent to make a deed; that *Getzinger* was a purchaser of the land in good faith and for a valuable consideration, namely, $4,200; and that the value of the land was $65 an acre. Judgment was entered on the finding against the plaintiffs, from which they appealed.

For the appellants there was a brief by *Sawyer & Sawyer*, and oral argument by *H. W. Sawyer*. They argued, among other things, that independent of affirmative proof the presumption of law is that the transaction in this case was fraudulent, and the burden of proof is on the defendants to show that it was not. *Davis v. Dean*, 66 Wis. 100; *Cowee v. Cornell*, 75 N. Y. 91; *Bowe v. Bowe*, 42 Mich. 195; *Farmer's Ex'r v. Farmer*, 39 N. J. Eq. 211; *Condit v. Blackwell*, 22 id. 481; *Porter v. Woodruff*, 36 id. 174; *Tate v. Williamson*, L. R. 1 Eq. 528; *Rhodes v. Bates*, 1 Ch. App. 252; *Billage v. Southee*, 9 Hare, 534; *Crawford v. Hoeft*, 58 Mich. 1; 2 Pomeroy, Eq. Jur. § 928; *Kelly's Heirs v. McGuire*, 15 Ark. 555; *White v. White*, 89 Ill. 460; *Willcox v. Jackson*, 51 Iowa, 208; *Butler v. Duncan*, 47 Mich. 94; *Brown v. Hall*, 14 R. I. 249; *Gifford v. Thorn*, 9 N. J. Eq. 702; *Chesterfield v. Janssen*, 2 Ves. Sr. 124; *Hall v. Perkins*, 3 Wend. 626; *Smith v. Cuddy*, 96 Mich. 562. The jurisdiction on this ground applies to transactions between persons occupying relations of trust and confidence, and to all near relatives. *Davis v. Dean*, 66 Wis. 100; *Watkins v. Brandt*, 46 id. 425; Story, Eq. Jur. 310; Kerr, Fraud

& M. 183, 184; 2 Pomeroy, Eq. Jur. § 963; *Sears v. Shafer*, 6 N. Y. 268; *Nichols v. McCarthy*, 53 Conn. 299; *Allore v. Jewell*, 94 U. S. 506; *Green v. Roworth*, 113 N. Y. 462; *Kelly v. Smith*, 73 Wis. 191.

For the respondents *Moody* there was a brief by *Bouck & Hilton;* for the respondents *Roberts* and *Farmer* there was a brief by *Goodrick & Goodrick;* and the cause was argued orally by *Gabe Bouck*, *E. J. Goodrick*, and *J. E. Malone.*

The following opinion was filed April 30, 1897:

PINNEY, J. 1. The facts, as disclosed by the evidence, have been stated so fully that but little comment is necessary. The deed of conveyance from Ira S. B. Cole to *Alice Farmer* of his farm of about seventy-five acres was procured from him presumptively by fraud and undue influence, practiced by the defendants *Cassius M. Moody*, *Betsey C. Moody*, his wife, and *Roberts*. The consideration for the deed was largely inadequate. The lands, found by the court worth $65 per acre, were sold for $40 per acre, and the sum of $4,200, paid for the farm within a few days thereafter, was received by these parties, $2,500 by *Moody* and his wife, and $1,200 by *Roberts;* and all that remained for Cole, the defrauded party, for his farm, was $500, further reduced to about $420 by the payment of the claim made on the part of *Roberts*, not shown to have had in fact any meritorious foundation; and finally it is left to inference that he ever received this small sum, for there is no evidence that it ever actually came to his hands. The evidence clearly shows that the parties named were actually in complicity to secure to themselves, as they did, nearly all the proceeds of the old gentleman's farm, the only property he had. He was a man burdened with the infirmities of his great age of eighty-eight years, and weak and feeble, both in mind and body. The decided preponderance of proof tends to show that, left to his own resources and methods, he was not competent to properly

and safely conduct and conclude a business transaction of the character of the one under consideration. He had lived with his son-in-law and his daughter, the *Moodys*, for the period of about sixteen years. His condition, and the relations between the parties, gave rise to mutual trust and confidence, and they owed him the duty to guard his interests and protect him against the intrigues and wiles of designing persons. Their relations and duty to him, in his dependent and feeble condition, were of a trust or fiduciary character. In respect to the making of this conveyance, their selfish interests were thus brought in direct conflict with their duty. It was greatly unjust to his four other children, who had claims on his bounty. None of his relatives or friends, save those who were to profit by it, or those acting for them, had any notice of the transaction, and some caution seems to have been exercised to prevent its being known. As was said in *Watkins v. Brant*, 46 Wis. 425: "This secrecy, if not a badge of fraud, is surely a badge of undue influence." The matter of the conveyance originated with *Roberts*, apparently, who started to buy the farm for *Getzinger*, and proposed to go and see Cole about buying it. He had known Cole all his life, and knew his great age, and evidently understood his situation and condition and his relations with the *Moodys;* and an understanding was arrived at in regard to it, and with the result as stated.

It is a well-established principle in courts of equity that a conveyance will be set aside wherever it has been obtained through undue influence over a person greatly under the power of another, if there is inadequacy of price, or clear ground of inference that the confidence reposed has been abused, or advantage been taken of incompetency or weakness of understanding, or clouded or enfeebled faculties; and many authorities to this effect are cited in *Earl of Chesterfield v. Janssen*, 1 White & T. Lead. Cas. Eq. pt. 2, 826, 827. "If deeds are obtained," said MARSHALL, C. J., in *Harding v.*

Handy, 11 Wheat. 104, 125, "by the exercise of undue influence over a man whose mind has ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case is among its best-settled principles."

The general principle is that where, from the nature of the transaction and the situation and relation of the parties, fraud and imposition may be presumed, unless their presumption be rebutted, relief will be granted in equity, although fraud in fact be not proved, and equitable jurisdiction may be exercised in such cases in respect to the instrument unduly obtained, when a court of law could not enter into the question. *Jackson v. King*, 4 Cow. 207–220; *Hall v. Perkins*, 3 Wend. 626–631; *Taylor v. Taylor*, 8 How. 183; *Wheeler v. Smith*, 9 How. 55, 82. And many cases to this effect are cited in the brief of plaintiffs' counsel.

The rule is strongly and clearly laid down in *Davis v. Dean*, 66 Wis. 100, 110,—a case quite similar in principle,—where it was said: "We do not say that fraud and undue influence were proved affirmatively, but only that the circumstances suggest them. If the burden of proof is upon the plaintiffs to show such fraud or undue influence, probably we could not disturb the findings of the circuit court, which negative their existence. But, under the circumstances of this case, the burden of proof is not upon the plaintiffs. Because the relations of the parties to each other were those of trust and confidence, and because of the suspicious circumstances under which the conveyances were made and the injustice which would be inflicted upon the heirs of the grantor if the conveyances are held valid, the law casts upon the grantee the burden of showing that the conveyances are untainted with undue influence or other fraud, but were the intelligent and deliberate act of the grantor. This rule is to

protect the weak and unsuspicious from the cunning and fraud of those who stand in confidential relations to them, and has its foundation in good morals and sound policy. The grantee has failed to satisfy the requirements of the rule, and the presumption of injustice, fraud, and wrong stand against the conveyances, which he must remove before the court is authorized to say that they are valid." *Allore v. Jewell*, 94 U. S. 506; *Cowee v. Cornell*, 75 N. Y. 91; *Smith v. Cuddy*, 96 Mich. 562; *Turner v. Collins*, 7 Ch. App. 329; *Gandy v. Macauley*, 31 Ch. Div. 1.

The conveyance of the farm to *Alice Farmer* was to serve the uses and purposes of *Moody* and wife and *Roberts*, the latter attempting to and in fact profiting by the trust and confidence the grantor had in *Moody* and his wife. *Alice Farmer* was in no sense a purchaser of the farm. Her relation to the transaction was a passive one. It was not intended that it should be gainful, and there is nothing to show that she was privy to any improper design.

So far from rebutting the presumption of fraud and undue influence, the evidence of the defendants *Moody* and wife and *Roberts* materially strengthens it. The case is destitute of any evidence showing that the old gentleman personally ever took any part in any negotiations for the sale of the property, or ever authorized any. Neither of these persons is willing to admit that he or she negotiated the alleged sale. *Mrs. Moody* says she did not hear any one make any bargain with her father, and that *Roberts* never saw him about it. "There wasn't anybody that saw father." *Roberts* wrote him letters, which came in her husband's name, and he and she wrote letters in reply. *Moody* says he did not conduct any negotiations for the sale of the property, and he agrees that *Roberts* did not see Cole; that "all the talk he had up there was with me, and that was all, except the letters he wrote." *Roberts* says he never had any conversation with the old gentleman Cole about the purchase. "My only ne-

gotiations were with *Mr. Moody*. I went to the house at one time, but did not see Mr. Cole. Don't think I asked for him." So far as the evidence goes, the old gentleman seems to have been wholly ignored until the witness Nevitt called on him to execute a deed of conveyance of his farm. It does not even appear that he knew to whom the conveyance was made, nor, up to that time, that he had uttered an articulate word to any one in respect to the sale of the farm. Nor is there any evidence that he read or knew the contents of any of the letters written by *Roberts*, or that he either wrote or directed any to be written in reply. If the letters contained the negotiations, or important parts thereof, why did *Roberts* take pains to get the entire correspondence in his hands when litigation ensued in respect to the farm, and why were they 200 miles away when the trial occurred, he having been served in due season with a subpœna *duces tecum* for their production? They might be of great service to the defendants, or they might contain damaging evidence against them. The failure to produce them as called for certainly justifies unfavorable inferences. The evidence of Nevitt does not clear up the difficulty. He knew nothing about the negotiations or the bargain. It had already been made, according to his understanding, and he went there to put the transaction in legal form, and his testimony does not show that the transaction was fair, and free from undue influence. It does not seem to have occurred to him to inquire what reason existed why the old gentleman should sell his farm for only about two thirds of its value, and then give away nearly all the money, securing no agreement for his own maintenance, and making no provision for any of his other four living children. Our conclusion is that the presumption against the validity of the deed has not been removed, and that it must be regarded as having been procured by fraud and undue influence.

2. The evidence does not show that *Getzinger* was a party

to, or had notice, actual or constructive, of, the wrongful procurement of the deed to *Alice Farmer*. The only ground upon which it can be contended that he is affected by the fraud and undue influence intervening in the procurement of the deed is that *Roberts* had undertaken to act for him in making this particular purchase. Evidently *Roberts* did not intend to purchase the land as an investment, and, had *Getzinger* known that he had procured the title and controlled it for $3,000, when he was exacting of him $4,200 for it, he might well have claimed the benefit of the purchase at $3,000 and a fair commission. *Roberts* had no idea of giving him the bonus of $1,200, which he says he put in his own pocket. And if *Roberts* was unfaithful to the duties of such agency, *Getzinger* would not be affected by constructive notice of what he did in procuring the title to be conveyed to *Alice Farmer* for the benefit of *Moody* and wife, and for his own great gain as well. *Law v. Grant*, 37 Wis. 548. The rule that the principal is affected with knowledge acquired by the agent in the transaction to which his agency relates is based upon the duty of the agent to disclose to his principal all knowledge and information he possessed at the time or acquired in relation to the subject matter of the agency, and the presumption is that he communicates it accordingly; but he cannot be expected to communicate information which, from his relation to the subject matter, he would not disclose; and where his relation to the previous transaction is such as would be sufficient to induce him to withhold the information the presumption of its communication is rebutted. *Melms v. Pabst Brewing Co.* 93 Wis. 154, 167–169, and cases cited. *Roberts* would not be likely to disclose that he was exacting for himself, of his principal, $1,200 more for the property than it was purchased for. In any view that may be taken of the case, we think that *Getzinger* must be regarded as a *bona fide* purchaser for value, and is entitled, as such, to hold the land.

3. The remedy remaining to the plaintiffs is, therefore, for damages or compensation, to be adjudged in money, for that of which they have been deprived, as heirs at law of their ancestor, by fraud and undue influence practiced on such ancestor. The land was not converted by the voluntary and lawful consent of their ancestor into money, but still remained to him, in equity, in its character and quality of real estate; but the trust that otherwise would have attached to the land in his favor and in favor of the plaintiffs as his heirs at law, upon his death, was displaced by the further wrongful act of these parties, namely, the causing of the title to become vested in a *bona fide* purchaser for value, so that the only relief that can be given under these circumstances is to charge them with the value of the land, or interest therein, of which they have been thus deprived, by way of compensation. It appears to be well settled that where a court of equity obtains jurisdiction for the purpose of granting some distinctively equitable relief such as the specific performance of a contract or the rescission or cancellation of some instrument, and it appears from facts disclosed at the hearing, but not known to the plaintiff when he brought his suit, that the special relief prayed for has become impracticable, and the plaintiff is entitled to the only alternative relief possible,— of damages,— the court may, and generally will, instead of compelling the plaintiff to incur the double expense and trouble of an action at law, retain the cause, decide all the issues involved, and decree the payment of mere compensatory damages (1 Pomeroy, Eq. Jur. § 237); especially since, by the Code, the distinction between courts of law and courts of equity has been abolished. *Hall v. Delaplaine*, 5 Wis. 206, 213; *Tenney v. State Bank*, 20 Wis. 161, 163, 164; *Hopkins v. Gilman*, 22 Wis. 476, 480; *Combs v. Scott*, 76 Wis. 672; *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 208.

One of the heirs — *Charlotte Losee* — having been made a

defendant and answered admitting the complaint and claiming the same relief as the plaintiffs, may properly be regarded as practically a plaintiff and entitled to the same relief.

It follows, therefore, that the judgment of the circuit court dismissing the complaint should be reversed, with costs, except as to the defendant *Getzinger*, and as to him it should be affirmed, with costs; and the cause must be remanded to the circuit court with directions to enter judgment in favor of the plaintiffs and of *Charlotte Losee*, awarding to each one fifth of the value of said premises, with costs.

By the Court.— Judgment is ordered accordingly.

A motion for a rehearing was denied June 24, 1897.

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HUBBARD, Appellant, vs. HALEY and another, Respondents.
HUBBARD, Respondent, vs. SHOVE, imp., Appellant.

May 3 — June 24, 1897.

(1) *Attachment: Practice.* (2) *Appeal: Pleading.* (3-7) *Contracts: Guaranty: Demand: Corporations:* Ultra vires: *Notice of default: Agency: Estoppel: Damages.*

1. A writ of attachment is not entirely void because issued to collect a debt part of which was not due, even though all the statutory requisites of an attachment for a debt not due had not been complied with, the debtor's remedy being limited to a modification of the writ and a release of the property as to the debt not due, under sec. 2744, R. S.
2. Defects in the complaint constitute no ground for reversal of a judgment in plaintiff's favor where they might have been cured at any time by amendment conforming the pleading to the facts conclusively proved by evidence admitted without objection.
3. Denial of all liability under an agreement to deliver annually for three years a certain quantity of manufactured goods to be selected rendered unnecessary a demand for the goods, specifying

kinds and prices, as they became due, as a condition of charging a guarantor of performance.

4. By an agreement for the sale of stock in a corporation the purchaser, H., was to make payment in goods of certain kinds to be manufactured by the corporation. Delivery of the goods was guaranteed by the corporation, and performance of the contract both by H. and by the corporation was guaranteed by S. In an action against S. on his guaranty, *held*, that he could not question the power of the corporation to make the contract.

5. The contract of guaranty by the corporation in such case was executed by H. as president, but it appeared that the officers and directors knew of the making thereof at the time it was made or soon thereafter; that the corporation through its officers recognized its validity and made payments thereon after H. severed his connection with the organization; and that the corporation was beneficially interested in the consideration. *Held*, that the corporation was estopped to deny H.'s authority.

6. No notice of the default of an original promisor is necessary to render liable a guarantor of payment or performance; the latter's promise being an absolute, not a conditional one.

7. Where, in an action for breach of a contract for the delivery of a certain amount of goods annually for three years, to be selected by the plaintiff, the complaint declared merely for successive defaults as the goods became due, and did not allege denial of liability, no recovery could be had for failure to deliver goods not due at the time of the commencement of the action.

APPEALS from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Action to recover on three past-due promissory notes, executed by defendant *Haley*, in favor of plaintiff, guaranteed by defendant *Shove;* also damages for nonfulfillment of a contract for the payment to plaintiff of $10,000 in manufactured goods of the defendant corporation, the Manitowoc Manufacturing Company; *Haley* being a principal promisor, the corporation a principal promisor or guarantor, and *Shove* a guarantor of the manufacturing company. A writ of attachment was sued out against the property of *Shove* on the ground that he had assigned, disposed of, and concealed his property, and was about so to do, with intent to

hinder and defraud his creditors. The allegations of the affidavit were duly traversed by *Shove*, and he also answered to the complaint, by which the issues covered by the findings were raised. All the issues were tried by the court. A motion was made to quash the writ on the ground that, by the complaint, a part of the debt was not due when the action was commenced, and the requisites to the issuance of such writ were not complied with. The motion was denied. The result of the trial of the issues formed by the affidavit for the writ of attachment, and the traverse, was that the facts alleged in such affidavit were found to exist, and the attachment was sustained. The result of the trial of the issues formed by the complaint and answer of *Shove* was that the court found, in addition to formal matters not necessary to refer to, in substance as follows:

(1) March 11, 1890, the corporation was engaged in the manufacture and sale of furniture. Plaintiff and defendants *Haley* and *Shove* were stockholders and directors. *Shove* was the principal stockholder and president of the T. C. Shove Banking Company. The manufacturing company was heavily indebted to the bank, and the greater part of plaintiff's stock in such company was pledged to such bank for debts of such company; and defendants *Haley* and *Shove* were familiar with the financial condition of such company, owned a majority of its stock, and controlled its business affairs.

(2) On the date above mentioned, an agreement in writing was made between plaintiff and *Haley*, whereby the former sold to the latter his stock in the manufacturing company, subject to the lien of the bank thereon, and agreed to give *Haley* the latter's two notes owned by plaintiff, aggregating $9,500.

(3) By the said agreement, *Haley* further promised to discharge plaintiff from all personal liability as surety for the manufacturing company, or to such company as a member

of the firm of Hubbard & Haley, and agreed to pay plaintiff $300 within ten days, $300 within sixty days, and $400 within four months, with interest at seven per cent. per annum, according to three promissory notes given with such agreement; and, further, to pay plaintiff $3,000 within one year, $3,000 after one year and within two years, and $4,000 after two years and before three years, such three payments to be in manufactured goods of the manufacturing company, selected by plaintiff, not more than one half of the annual amount thereof to be required, however, in each six months of any year; the prices of the goods the first year to be the same as prices made to the American Desk & Seating Company, all changes in prices thereafter to be governed by any change in the price of raw material; the price of goods selected not priced to the American Desk & Seating Company to be the lowest job price of similar goods sold to other jobbers, and with similar rebates.

(4) It was further provided that the delivery of the goods should be guaranteed by the manufacturing company by its acceptance of the terms of the contract, and agreement to fill the orders of plaintiff for goods, and charge the same to *Haley*, and that the performance of the contract by *Haley* and by the manufacturing company should be guaranteed by the defendant *Shove* for a valuable consideration to be paid by *Haley*.

(5) The contract was duly executed and delivered, and defendant *Shove*, before such delivery, knew of its provisions and agreed thereto; and such agreement was a material part of the transaction.

(6) Prior to such delivery, the manufacturing company, by its president, made thereon a written agreement, as follows:

"In consideration of one dollar ($1) to it in hand paid, the receipt whereof is hereby admitted, and on account of other valuable considerations, the Manitowoc Manufacturing Company does hereby guarantee the fulfillment of the

above and foregoing contract so far as the sale and delivery of its goods, as in said contract specified, is concerned only, and agrees to deliver said goods at the times, to the persons, and under the circumstances specified in said contract, and to look to *F. H. Haley* solely for the payment of the same.

"Dated this 11th day of March, 1890.

"Executed in duplicate.

"Manitowoc Manufacturing Company. [Seal.]
"F. H. Haley, President. [Seal.]"

(7) *Shove*, on the instrument, prior to such delivery, executed the following:

"In consideration of one dollar ($1) to me in hand paid by the said *F. H. Haley*, and on account of other valuable considerations, I do hereby guarantee the fulfillment of the above foregoing contract, in so far as the payment of $1,000 is concerned by the said *F. H. Haley*, and by the said Manitowoc Manufacturing Company in so far as the delivery of the goods is concerned only; and it is intended to include in this guarantee the payment of the three notes to be given by the said *Haley*, aggregating the sum of $1,000, as specified in the foregoing guarantee only.

"Witness my hand and seal, this 11th day of March, 1890.

"Executed in duplicate. T. C. SHOVE. [Seal.]"

(8) At the time of making the contract, a price list of goods being sold to the American Desk & Seating Company was on file in the office of the manufacturing company, and there has been no substantial change in such prices, or change in the cost of producing such goods, or in the jobbing prices for such goods, and such goods were worth the money prices fixed therefor by contract. The failure to deliver the goods was equivalent to withholding the amount of money represented thereby.

(9) The notes have not been paid, though due demand therefor was made, and defendant *Shove* had due notice thereof, and of *Haley's* default. The amount due is $1,384.

(10) The officers and directors of the manufacturing company knew of the aforesaid contract when made, and such company delivered thereon $2,405.73 worth of goods during the two years following its execution.

(11) Plaintiff ceased to be an officer in such company after the making of the contract, but remained in its employ. The stock sold to *Haley* was surrendered by him to the company, and re-issued, part to *Shove*, and part to other persons, who gave notes therefor to the bank, or to *Shove*, for debts of the manufacturing company; so that *Shove* and such company had the full benefit of such stock.

(12) February 1, 1892, plaintiff demanded of the manufacturing company goods under the contract, of which a large amount was then due. It refused to comply with such demand. About April 8, 1892, plaintiff renewed such demand, and the company refused to recognize any liability whatever under the contract.

(13) The property of the manufacturing company, after the last demand aforesaid, was destroyed by fire. It thereafter made an assignment for the benefit of its creditors, and is wholly insolvent. At the time of such assignment, the banking company was a principal creditor, and *Shove* knew of the assignment, and of the assignee's refusal to deliver goods under the contract. *Haley* left the county before, and his residence was not known to plaintiff when, this action was commenced.

(14) No false representations were made to induce defendant *Shove* to sign the contract.

(15) Plaintiff complied with all the conditions of the contract requisite to entitle him to receive the goods of the manufacturing company.

(16) *Shove* and such company were parties to the contract between plaintiff and *Haley* as original promisors, although in form as guarantors.

(17) *Shove's* liability on the contract is not affected by the question of whether such company was bound or not.

(18) *Shove's* knowledge of the business of such company was such that no formal notice of its default was necessary in order to charge him in this action.

(19) Plaintiff cannot recover the last $2,000 of the instalment of $4,000, because it was not due when the action was commenced.

(20) Plaintiff is entitled to judgment against defendant *Shove* for $8,213.27, with costs and disbursements.

Appropriate exceptions were filed to the findings and conclusions of the trial court, to raise the questions discussed in the opinion. Judgment was entered upon the findings. Plaintiff appealed from that part of the judgment which refused a recovery of the last instalment of $2,000, and *Shove* appealed from all of the judgment except for the amount due upon the three notes aggregating $1,000, with the accrued interest thereon.

J. S. Anderson, attorney, and *W. H. Timlin*, of counsel, for the plaintiff, argued, among other things, that no notice to the guarantor on a guaranty of this kind was necessary. *Mallory v. Lyman*, 3 Pin. 443; *Day v. Elmore*, 4 Wis. 190; *Heyman v. Dooley*, 77 Md. 162; *Clay v. Edgerton*, 2 Am. Rep. 422; *Wise v. Miller*, 45 Ohio St. 388. The authorities cited by the defendant go no farther than to hold that failure to give notice to the guarantor is available as a defense when he is damaged thereby, and to the extent to which he is so damaged. *Furst & Bradley Mfg. Co. v. Black*, 111 Ind. 308; *Burrow v. Zapp*, 69 Tex. 474; *Voltz v. Harris*, 40 Ill. 155; 1 Brandt, Suretyship & G. § 202.

For the defendant *Shove* there were briefs by *Felker, Goldberg & Felker*, attorneys, and *F. A. Gilman*, of counsel, and oral argument by *Mr. Gilman*. They contended, *inter alia*, that the guaranty in this case was collateral. *Virden v. Ellsworth*, 15 Ind. 144; *Milroy v. Quinn*, 69 id. 410; *Gaff v. Sims*, 45 id. 264; *Dwight v. Williams*, 4 McLean, 582; *White v. Case*, 13 Wend. 543; *Eddy v. Stantons*, 21 id. 255; *Howe v. Nickels*, 22 Me. 175; *Smith v. Loomis*, 72 id. 53, 57; *Swift v. Beers*,

3 Denio, 70; *Nellis v. Clark*, 20 Wend. 27; *Dedham Bank v. Chickering*, 4 Pick. 314. *Shove* was entitled to notice of the default both of the Manitowoc Mfg. Co. and of *Haley*. *Sandford v. Norton*, 14 Vt. 228; *Train v. Jones*, 11 id. 446; *Knapp v. Parker*, 6 id. 642; *Peck v. Barney*, 13 id. 96; *Noyes & Co. v. Nichols*, 28 id. 175; *Sylvester v. Downer*, 18 id. 35; *Bull v. Bliss*, 30 id. 130, 133; *Beebe v. Dudley*, 26 N. H. 249, 253; Brandt, Suretyship & G. §§ 92, 97, 98; Baylies, Sureties & G. 198, 200, 202, 203; *Clark v. Remington*, 11 Met. 364, 375; *Jordan v. Dobbins*, 122 Mass. 168; *Taussig v. Reid*, 145 Ill. 488.

MARSHALL, J. The motion to quash the writ of attachment was properly denied. True, sec. 2731, R. S., provides that a writ of attachment may issue for a debt not due, upon an affidavit stating the facts in that regard; but there is no controversy here that the debt in question was not due, except $2,000; hence, at most, the writ was improperly issued only as to that amount. In any event, it was not wholly void. While it is the law that if a writ of attachment be issued and an action commenced for a debt no part of which is due, and the statutory requisites are not complied with, the writ should be quashed on motion and the action dismissed (*Gowan v. Hanson*, 55 Wis. 341), where a part of the debt is due, and part not due, the writ must stand as to the former, and be dismissed or modified, on proper motion, as to the latter. *Levy v. Millman*, 7 Ga. 167; *Danforth v. Carter*, 1 Iowa, 546; Drake, Attachment, § 33. As intimated in *Danforth v. Carter*, the motion to quash is in the nature of a general demurrer, and the rule is that where the pleader attempts to state two causes of action and fails as to one, a general demurrer to the whole complaint must be overruled. So here, treating the facts set forth in the complaint as part of the proceedings on the attachment, the motion did not distinguish between that part of the debt which was due

and the part not due; and, as the writ was sufficient as to the former, the motion as to the whole was properly denied. The foundation for a writ of attachment under the statute is a proper affidavit; that being sufficient on its face, the right to the writ is absolute. *Davidson v. Hackett*, 49 Wis. 186. The giving of the bond is not essential to the issuance of the writ, but is to its execution and to the maintenance of the proceedings. R. S. sec. 2732. So, at most, the remedy of the defendant here, on its appearing that a part of the debt was not due, if such were the fact, was confined to a motion for a modification of the writ, under sec. 2744, R. S., on that ground, and a release of the property from the attachment as to the debt not due, because of the failure to give a proper bond.

Under the familiar rule that the findings of the trial court as to questions of fact cannot be disturbed unless contrary to the clear preponderance of the evidence, we are unable to see any justification for disturbing the findings of fact in this case, either as to the issue formed by the affidavit for the writ of attachment and the traverse thereto, or the issues formed by the complaint and answer. Much time might be spent referring in detail to the evidence found in the record bearing on the findings of fact excepted to by appellant *Shove*, but it is not deemed necessary or advisable so to do; hence we rest the case on this subject by stating the conclusions to which we have arrived; that we have carefully examined the evidence as to each particular fact; that it is quite clear from such examination that the trial court had a legitimate basis for its conclusions as to each such fact; and, keeping in mind that the circuit judge had a far better opportunity for drawing the correct inferences from the evidence than is possessed by the appellate court, that we cannot say there is a clear preponderance of the evidence against his findings of fact, or any of them.

Several questions are discussed in appellant's brief in a

general way, without being directed to any distinct assignment of errors. So, to determine the particular errors relied upon from such discussion is not without difficulty. Some defects in the complaint are claimed to exist going to the subject of whether there was a default on the part of the original promisor or promisors so as to render the guarantor *Shove* liable; but the evidence admitted without objection conclusively shows that the manufacturing company denied all liability under the contract. That made a demand of the company for goods, specifying kinds and prices, as the debt fell due, unnecessary. Any defect in the complaint in that regard could have been cured by amendment on the trial, or at any time on application, without prejudice to the defendant. Therefore such defects, if any there are, constitute no ground for reversal of the judgment. *Haney v. The Rosabelle*, 20 Wis. 247; *Forcy v. Leonard*, 63 Wis. 353.

The point is made and pressed with seriousness that the contract on the part of the manufacturing company was *ultra vires;* hence that the guarantor *Shove* was not bound. That presents several questions: First. Did the corporation have power under its charter to make the contract? Second. If there were a want of corporate power, can defendant *Shove* object on that ground? Third. Was *Haley* authorized to make the contract in its behalf? Fourth. If not originally authorized, was his act subsequently ratified by the corporation? Fifth. If the contract were not binding on the corporation, does that fact relieve the guarantor from liability?

Not all of these questions need be considered. The question of whether the corporation had power to make the contract is immaterial, because the doctrine applies that neither the corporation, nor any private person for it or on his own behalf, can defend successfully on that ground.

The subject of under what circumstances and by whom the doctrine of *ultra vires* can be invoked against a corpora-

tion that has exceeded its powers in the making of contracts has been recently fully discussed in this court in *John V. Farwell Co. v. Wolf*, *ante*, p. 10, where the rule was laid down and supported by numerous decisions of other courts, that, if a corporation transgress its power in the making of a contract, the offense committed is against the sovereignty of the state by which it is permitted to have existence, and, except in particular cases of which this is not one, neither party to the contract can invoke the doctrine of *ultra vires* to avoid it, but the sole remedy is a proceeding to punish the corporation by ousting it from its corporate franchise, and the sole responsibility of applying such remedy is vested in the sovereignty against which the offense is committed. So, it follows, as stated, that whether the Manitowoc Manufacturing Company had power to make the contract or not is immaterial to this case.

The third question suggested is immaterial, because the fourth must be answered in the affirmative. It conclusively appears that the officers and directors of the corporation knew of the making of the contract at the time it was made, or soon thereafter; that the corporation, through its officers, after *Haley* severed his connection with the organization, recognized the validity of the contract for a considerable length of time, and made payments thereon; and the court found as a fact that the corporation was beneficially interested in the consideration of the contract, which consideration was fully paid by plaintiff by turning over his stock, the avails of which went largely to the corporation; hence, it cannot now successfully allege want of authority to make the contract. This rests on elementary principles of estoppel by conduct, so well understood and so frequently applied that no citation of authority is considered necessary to justify their application to the facts of this case.

It is further contended that defendant *Shove* cannot be held liable for want of notice of the default of the principal prom-

isor or promisors. He, in terms, guaranteed the performance of the contract on the part of the manufacturing company. The guaranty was for the delivery of the goods in accordance with the terms of the contract. Guaranties of performance and of payment are placed upon the same ground. They are absolute, not collateral promises; hence no notice of the default of the original promisor is necessary. Such was the decision of this court at a very early day (*Mallory v. Lyman*, 3 Pin. 443), and it has not since been departed from. Unlike the contract of an indorser, there is no condition as to demand and notice of default annexed to a contract of guaranty of payment or of performance. Such a guaranty is an absolute promise that the principal will perform in accordance with the provisions of his contract. It is as absolute in respect to such performance as the promise of the principal; hence it is the business of the guarantor to inform himself as to the conduct of his principal, and, in an action against the former, the facts essential to a recovery are just the same as in respect to the latter. There is no difference. That there is some conflict of authority on this question is recognized, but it is considered that the true rule is as stated, and certainly it has too long prevailed here to be disturbed, even if, as an original proposition, any good reason can be given for such disturbance, and none is perceived. When a guarantor makes an absolute promise that any particular thing shall be done, he thereby assumes an active, absolute duty to see that it is done, and must, at his peril, perform the promise. While it is true that the guarantee, from his situation as such, possesses better means of knowing of the default of the principal than the guarantor, the latter has ample means of knowing the facts, and must inform himself, and not rely upon the guarantee, who owes no duty to the guarantor except to act in the utmost good faith and not be guilty of laches to his prejudice.

The foregoing, it is believed, covers all the questions which

require special notice on defendant *Shove's* appeal. Other questions are discussed in the briefs of counsel, and have been considered, but no reversible error is discovered therein, or reason for further discussion perceived.

On plaintiff's appeal the question is presented of whether the record shows an entire breach of the contract, so as to warrant a recovery for damages for the last instalment of $2,000. The complaint does not allege an entire breach and repudiation of all liability under the contract; neither is there any finding of facts in that regard. Plaintiff declared for successive defaults in the payment of sums as they became due,— that is all. Hence it is quite clear that a final breach was neither alleged, nor any facts found to warrant a recovery for such breach, so as to bring the case within the familiar rule that, if the breach of a contract be final and conclusive, damages may be recovered, prospective as well as those suffered up to the time of the commencement of the action. 3 Parsons, Cont. (8th ed.), *189; *Remelee v. Hall*, 31 Vt. 582. The weakness of plaintiff's position is that while he asked for judgment covering prospective damages, as well as those already accrued, the facts alleged do not constitute a final breach. There is no allegation of denial of liability, but simply of a refusal to deliver the goods that had become due. It cannot therefore be said that damages for failure to deliver goods not due were caused from the breach complained of. It is absolutely necessary to a recovery of prospective damages that they proceed from the cause of action set forth in the complaint. These reasons are considered sufficient to warrant the conclusion reached by the trial court that, as to the $2,000 of the last instalment of $4,000, no damages had accrued up to the time of the commencement of the action from any facts alleged in the complaint, or found to exist within the issues made by the pleadings.

By the Court.— The judgment of the circuit court is affirmed on both appeals.

GUETZKOW BROTHERS COMPANY, Respondent, vs. BREESE and another, Appellants.

May 26—June 24, 1897.

96 591
59 LRA 300

Duress of goods: Landlord and tenant: Agreement to insure: Apportionment of insurance money.

1. Where a lessee, who, in compliance with the terms of the lease, had taken out insurance policies covering the lessors' interest in the premises as well as his own, was so situated after a loss that he must obtain the insurance money at once in order to go on with his business, the refusal of the lessors to execute proofs of loss, or indorse drafts given in payment thereof, unless the lessee would agree to pay them a considerable sum in excess of what was legally due them under the policies, and which the lessee did not owe them, constituted duress of goods; and the lessee may recover back the sum so unjustly exacted.
2. By the terms of a lease the lessors were given a lien for their rent upon an engine and boiler which the lessee was to place on the premises, and the lessee was required to keep the buildings and the engine and boiler insured for not less than $6,200. The lessee took out several policies, payable to the lessors and to itself, as their interests might appear. Each thousand dollars of insurance was divided into items covering different classes and pieces of property, the total amount on the main building being $3,333.26, on the boiler house $833.50, and on the engine and boiler $3,333.26. The main building and its contents were totally destroyed. *Held,* that the agreement to insure had been complied with, and that the lessors were entitled only to the amount for which that building had been insured, even though such amount was less than its value.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

This is an action to recover $506.74, alleged to have been extorted from plaintiff corporation by the defendants by duress of goods. The action was tried by the court. There were many facts which are not disputed, and these facts may be briefly stated as follows:

In April, 1892, the firm of Grant, Breese & Co. owned

certain lots in the city of Milwaukee, on which they constructed at about that time a large factory building and a smaller building for a machine shop and boiler house. These buildings were constructed for them by the *Guetzkow Bros. Co.*, and cost $6,200. On the 30th day of April, 1892, Grant, Breese & Co. leased to the plaintiff corporation said lots and the buildings thereon for a term of ten years from the 1st of May, 1892, at an annual rental of $1,620, to be paid in monthly instalments in advance. By the terms of said lease, among other things, the lessors agreed to rebuild the buildings in case they were destroyed by fire, to keep the docks adjoining the premises in good repair and the slip properly dredged, to maintain a railroad side track upon the premises, to pay all taxes on the premises, the lessee, however, to reimburse the lessors for such amount of the taxes as were levied upon the buildings. The lessee, upon its part, agreed to pay the rent as specified, to quietly deliver up the premises at the end of the term in as good condition as when it took possession, inevitable accident and ordinary wear and loss by fire without its neglect excepted; "also to keep the buildings upon said premises and the machinery contained constantly insured in a good responsible insurance company or companies for not less than six thousand two hundred dollars, payable, in case of loss, to the said lessors as their interest may appear." It was further provided in the lease that the lessors should have a lien on the dry kiln and barn to be erected by the lessee upon the premises, and upon the engine and boiler to be placed by said lessee in the aforesaid engine house,— said dry kiln, barn, and boilers to cost not less than $5,800,— to secure the payment of the rent and any other sum to be paid by the lessee to the lessors under the lease; the lessee having the right to remove said dry kiln, barn, engine, and boiler at the expiration of the lease, and after full payment of any sum due thereon. The remaining provisions of the lease are not necessary to be stated.

Immediately upon the execution of this lease the plaintiff corporation went into possession of the property, and conducted its business of contracting and building thereon up to the time of the fire which destroyed the larger building or machine shop March 31, 1895. The plaintiff corporation placed in the buildings a large amount of machinery, as was necessary for conducting its business, and also placed upon the premises a considerable quantity of manufactured and unmanufactured lumber.

In February, 1895, there was upon the entire premises $25,000 in insurance, mostly in policies of $1,000 each, which had been placed thereon by the plaintiff corporation. The beneficiaries named in each of the policies were "*L. L.* and *W. L. Breese* and *Guetzkow Bros. Co.*, as interest may appear." (*L. L.* and *W. L. Breese* had succeeded Grant, Breese & Co. in the ownership of the premises prior to this time.) Each thousand dollars of insurance was divided into items covering different classes and pieces of property. Thus out of each $1,000 of insurance $133.33 was placed upon the machine shop, $333.33 on the fixed and movable machinery of all descriptions, $300 on the lumber and stock of all descriptions, $33.34 on the boiler and engine house, $133.33 on the engine, boiler, and appurtenances. There were also smaller items, which it is unnecessary to state. By computation it will be easily seen that the amount of insurance upon the factory building in the whole $25,000 of insurance was $3,333.26, and upon the brick engine house $833.50; thus making the amount of insurance upon the buildings owned by the defendants $4,166.76, and leaving a balance of $20,833.24 upon the machinery, stock, and other property owned by the plaintiff corporation.

February 15, 1895, there was a small fire, which destroyed property to the amount of a little over $500 belonging to the plaintiff corporation, and in which the *Breeses* had no interest. This loss was adjusted, and after its adjustment

the gross amount of insurance was $24,458.46, but the protection to the defendants stood the same as before. On the 31st of March, 1895, a fire occurred which totally destroyed the factory building, but not the engine house. At this time the plaintiff corporation was in arrears of rent between $1,800 and $1,900. It became necessary at once to make out proofs of loss, and then occurred the difficulty which gave rise to this action. There is a dispute in the testimony as to just what took place between the parties at this time. The claim of the plaintiff is that the defendants insisted that they must have $4,000 out of the insurance money on account of the loss of the building, and that they would not sign the proofs of loss until they were assured that sum; nor would they sign the drafts payable to the joint order of both parties until they were assured that they would receive $4,000. The plaintiff also claims that at that time it had numerous contracts on hand for the construction of buildings, and that it was absolutely necessary for it to settle the losses at once in order to go on with its business, and that by stress of these facts it was compelled under duress to agree to pay $666.74 to the defendants, which they were under no legal obligations to pay, and that they did thereafter pay $506.74 of such sum. The claim of the defendants, on the other hand, is that under the lease they were entitled to assurance payable to them to the amount of $6,200 upon the buildings and any interest which they might have in the machinery; and that the plaintiff's failure to keep the insurance as the lease provided did not prevent the defendants, as between them and the plaintiff, from claiming the full amount which ought to have been carried. They further claim that the factory building was worth at least $4,000, and more than that proportionately, and that they were, therefore, entitled to be paid out of the insurance $4,000, if not more. The defendants deny any compulsion, but claim that the matter was simply a differ-

ence of opinion as to their legal rights, and that it was finally settled by agreement without duress, by which they were to receive $4,000, instead of $3,333.26.

The findings of fact made by the trial court were as follows:

"First. That shortly before the 31st of March, 1895, the plaintiff and the defendants jointly applied to various fire insurance companies for, and then obtained, various policies of fire insurance against loss by fire issued to them, and payable as their interests might appear on their properties thereafter, then respectively situated upon the premises described in the complaint, to wit, on the three-story frame building, the property of the said defendants, policy for the sum of $3,333.26; on the property of the plaintiff, consisting of machinery, office furniture and fixtures, lumber, manufactured and unmanufactured, on the said premises, policies in the aggregate of $21,125.20.

"Second. That afterwards, on the 31st day of March, 1895, the said three-story building was destroyed by fire without fault of the plaintiff, and at the same time the property of the plaintiff so as aforesaid insured was in like manner destroyed by fire without fault of the plaintiff.

"Third. That thereafter the losses of the plaintiff and defendants were adjusted by the several insurance companies, and such adjustments accepted by the parties, plaintiff and defendants, as follows: The defendants' said losses at $3,333.26, and no more; and the plaintiff's losses at $14,444.40.

"Fourth. That by the terms of said policies of insurance the defendants and plaintiff were required to unite in making proofs of their said losses to said insurance companies, and the amount as aforesaid, due to the plaintiff and defendants, to be made payable to their joint orders.

"Fifth. That at the making of said proofs of losses the defendants did wrongfully and unlawfully demand of and

from the plaintiff the sum of $666.74, not then justly owing by the plaintiff to said defendants, or any part thereof; and did then and there, by duress and bad faith, demand of the plaintiff, as condition of the defendants uniting with it in procuring the money for its said losses, the sum of money last aforesaid, to which, nor any part thereof, the defendants well knew then and there they were not entitled; and that the plaintiff, in order to secure its insurance of $14,444.40 from the said insurance companies, was thereby compelled to agree to and with the defendants under duress and compulsion to pay the said sum of $666.74 aforesaid to the defendants in order to obtain its said insurance. And the defendants refused to unite with the plaintiff in collecting its insurance moneys until the plaintiff had agreed to pay the sum of $666.74. And the plaintiff would have been unable to obtain the moneys due from said insurance companies without such agreement.

"Sixth. That after such proofs of losses were made and the same adjusted as aforesaid, and after checks for the payment thereof had been issued payable to the joint order of the plaintiff and defendants, the defendants further refused to indorse said checks, or either of them, so as to enable the plaintiff to receive the amount of its said insurance, or any part thereof, until the said plaintiff had agreed to pay the last-named sum of $666.74. And in pursuance of such agreement the plaintiff did then and there pay to defendants on account of said unjust and unlawful claim the sum of $506.74, which sum was paid in pursuance of said contract of duress and compulsion, and which would not otherwise have been paid by the plaintiff. And the several allegations of the answer are unproven and untrue in fact."

From these facts the court concluded that the plaintiff was entitled to judgment for $506.74, with interest from March 31, 1895, and from said judgment the defendants appealed.

For the appellants there were briefs by *Winkler, Flanders,*

Smith, Bottum & Vilas, and oral argument by *H. K. Gibson*. They contended, *inter alia*, that the facts found did not constitute duress. 2 Greenl. Ev. § 301; 6 Wait, Act. & Def. 660, par. 8; *Seymour v. Prescott*, 69 Me. 376; *York v. Hinkle*, 80 Wis. 626; *Kruschke v. Stefan*, 83 id. 373; *Peyser v. New York*, 70 N. Y. 497; *Flower v. Lance*, 59 id. 603; *Emery v. Lowell*, 127 Mass. 138; *Cable v. Foley*, 45 Minn. 421; *Lamson v. Boyden*, 57 Ill. App. 232; *Custin v. Viroqua*, 67 Wis. 314; *Natcher v. Natcher*, 47 Pa. St. 496; *Detroit v. Martin*, 34 Mich. 170; *McCormick v. Valsack*, 4 S. Dak. 67; *Goebel v. Linn*, 47 Mich. 489; *Preston v. Boston*, 12 Pick. 13; *Miller v. Coats*, 4 Thomp. & C. 429.

N. S. Murphey, of counsel, for the respondent, argued, among other things, that duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them in possession, but refuses to surrender them unless the exaction is submitted to. 6 Am. & Eng. Ency. of Law, 57–60, note 4; *Cobb v. Charter*, 32 Conn. 358; *Astley v. Reynolds*, 2 Strange, 915; *Smith v. Bromley*, 2 Doug. 696, note; *Ashmole v. Wainwright*, 2 Q. B. 837; *Harmony v. Bingham*, 12 N. Y. 99; *Scholey v. Mumford*, 60 id. 498; *Chase v. Dwinal*, 7 Me. 134; *Chandler v. Sanger*, 114 Mass. 364; *Spaids v. Barrett*, 57 Ill. 289; *Foss v. Hildreth*, 10 Allen, 76; *City Nat. Bank v. Kusworm*, 88 Wis. 202. The principle applies equally well when money is extorted as a condition to the exercise of any other legal right. *Bates v. New York Ins. Co.* 3 Johns. Cas. 238; *Beckwith v. Frisbie*, 32 Vt. 559; *Adams v. Reeves*, 68 N. C. 134. Or when money is paid upon a wrongful demand to prevent great and irreparable mischief. *Corkle v. Maxwell*, 3 Blatchf. 413; *Ladd v. Southern C. P. & Mfg. Co.* 53 Tex. 172; *Dickerman v. Lord*, 21 Iowa, 338; *Vyne v. Glenn*, 41 Mich. 112; *Briggs v. Boyd*, 56 N. Y. 289.

WINSLOW, J. We entertain no doubt that under the facts found by the circuit court there was a case of duress of

goods. The case was this: The plaintiff could not obtain the insurance money due it unless the defendants joined in executing the proofs of loss and in indorsing the drafts. The defendants refused to do these things unless the plaintiff would pay them $666.74, which it did not owe. The plaintiff was in a position where it must obtain its insurance money at once in order to go on with its business and fulfill valuable outstanding contracts, or it would suffer great loss. Under these circumstances it submitted under protest to the unjust demand in order to obtain its own money from the insurance company. This makes a case of legal duress of goods. *Vyne v. Glenn*, 41 Mich. 112; *Corkle v. Maxwell*, 3 Blatchf. 413; *Scholey v. Mumford*, 60 N. Y. 498; *Cobb v. Charter*, 32 Conn. 358.

The question is, therefore, whether the findings of fact are sustained by the evidence. We have carefully read the evidence, and are satisfied that as to the greater part of the facts found the evidence is amply sufficient to sustain the findings. Among these facts so sustained by the evidence are the following: That the plaintiff's losses by the fire were over $14,000; that the plaintiff was unable to obtain the money from the insurance companies without the signature of the defendants to the proofs and checks; that the defendants refused to sign until the plaintiff had contracted to pay $666.74 out of the insurance moneys to the defendants; that the plaintiff would have suffered great hardship and injury in its business if it had been deprived of its insurance moneys for any considerable time; and that the plaintiff actually paid the sum of $506.74 upon said forced agreement. The only other fact remaining necessary to be found in order to establish a good case is the fact that the claim of the defendants against the plaintiff for $666.74 was an unjust and unfounded claim. This is, of course, a vital fact, and if it did not exist — i. e. if the claim was in fact a valid one — the action certainly will not lie, because it is of the gist of the action that the money extorted be upon a groundless claim.

It is vigorously claimed that the evidence shows the claim of the defendants to receive $4,000 for the building was a valid one. This contention is based upon the agreement to insure contained in the lease, which, the defendants claim, has not been carried out. This agreement was, in effect, that the plaintiff would keep the buildings and machinery insured for not less than $6,200, payable, in case of loss, to defendants, as their interest may appear. No amount is specified which should be put upon any one building or upon the machinery. That was apparently left to the judgment of the plaintiff. Now, was this agreement fulfilled? If it was, then the defendants had no just claim for any more than the amount for which the building destroyed was insured. The evidence shows that all the policies were joint policies, and there seems no doubt but that this fact was known to the defendants. They were payable to the plaintiff and to the defendants as their interest might appear. There was undisputedly $3,333.26 of the insurance upon the main building which was destroyed, $833.50 upon the engine and boiler house, and $3,333.26 upon the engine and boiler and connections; thus making about $7,500 in gross upon the buildings and engine and boiler. This sum was in fact all payable to the defendants if their interest in the two buildings and the engine and boiler amounted to that sum. It will be remembered that, though the plaintiff furnished the engine and boiler, the lease, which was executed by both parties under seal, provided for a lien in favor of the defendants upon the boiler and engine for all unpaid rent, so that the defendants might, in fact, have a large interest by way of lien upon that part of the machinery. It appears by the evidence that at the time of this fire there was nearly $1,900 of unpaid rent. Under the lien provision of the lease this sum seems to have been a lien upon the engine and boiler, and, had they been destroyed, the defendants would have been protected to that amount in addition to the protection afforded by the insur-

require special notice on defendant *Shove's* appeal. Other questions are discussed in the briefs of counsel, and have been considered, but no reversible error is discovered therein, or reason for further discussion perceived.

On plaintiff's appeal the question is presented of whether the record shows an entire breach of the contract, so as to warrant a recovery for damages for the last instalment of $2,000. The complaint does not allege an entire breach and repudiation of all liability under the contract; neither is there any finding of facts in that regard. Plaintiff declared for successive defaults in the payment of sums as they became due,— that is all. Hence it is quite clear that a final breach was neither alleged, nor any facts found to warrant a recovery for such breach, so as to bring the case within the familiar rule that, if the breach of a contract be final and conclusive, damages may be recovered, prospective as well as those suffered up to the time of the commencement of the action. 3 Parsons, Cont. (8th ed.), *189; *Remelee v. Hall*, 31 Vt. 582. The weakness of plaintiff's position is that while he asked for judgment covering prospective damages, as well as those already accrued, the facts alleged do not constitute a final breach. There is no allegation of denial of liability, but simply of a refusal to deliver the goods that had become due. It cannot therefore be said that damages for failure to deliver goods not due were caused from the breach complained of. It is absolutely necessary to a recovery of prospective damages that they proceed from the cause of action set forth in the complaint. These reasons are considered sufficient to warrant the conclusion reached by the trial court that, as to the $2,000 of the last instalment of $4,000, no damages had accrued up to the time of the commencement of the action from any facts alleged in the complaint, or found to exist within the issues made by the pleadings.

By the Court.— The judgment of the circuit court is affirmed on both appeals.

GUETZKOW BROTHERS COMPANY, Respondent, vs. BREESE and another, Appellants.

May 26—June 24, 1897.

96 591
59 LRA 300

Duress of goods: Landlord and tenant: Agreement to insure: Apportionment of insurance money.

1. Where a lessee, who, in compliance with the terms of the lease, had taken out insurance policies covering the lessors' interest in the premises as well as his own, was so situated after a loss that he must obtain the insurance money at once in order to go on with his business, the refusal of the lessors to execute proofs of loss, or indorse drafts given in payment thereof, unless the lessee would agree to pay them a considerable sum in excess of what was legally due them under the policies, and which the lessee did not owe them, constituted duress of goods; and the lessee may recover back the sum so unjustly exacted.
2. By the terms of a lease the lessors were given a lien for their rent upon an engine and boiler which the lessee was to place on the premises, and the lessee was required to keep the buildings and the engine and boiler insured for not less than $6,200. The lessee took out several policies, payable to the lessors and to itself, as their interests might appear. Each thousand dollars of insurance was divided into items covering different classes and pieces of property, the total amount on the main building being $3,333.26, on the boiler house $833.50, and on the engine and boiler $3,333.26. The main building and its contents were totally destroyed. *Held*, that the agreement to insure had been complied with, and that the lessors were entitled only to the amount for which that building had been insured, even though such amount was less than its value.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

This is an action to recover $506.74, alleged to have been extorted from plaintiff corporation by the defendants by duress of goods. The action was tried by the court. There were many facts which are not disputed, and these facts may be briefly stated as follows:

In April, 1892, the firm of Grant, Breese & Co. owned

the defendant,—for all of which the defendant agreed to pay its said agents a selling commission of twenty-five per cent. on all cash received on sales, and twenty-three per cent. upon all notes taken on sales to good and responsible parties. "Commissions shall only be paid on machines sold and settled for, and none shall be paid on machines returned condemned, or on orders that are not filled."

The contract further provided that the agents agreed "not to retain, on account of commissions or other claims against the said *McCormick Harvesting Machine Company*, any money, notes, or other property received from sales of machines, twine, binder trucks, bundle carriers, flax dumps, repairs, or any other property, or collections on notes or accounts, but to promptly remit all moneys, notes, or other property to said company or their authorized general agent, leaving the commissions and any other claims to be determined and paid at settlement. . . . It is further mutually agreed that said *McCormick Harvesting Machine Company* shall at all times have exclusive and entire control over orders, contracts, notes, moneys, and assets or other property accruing and growing out of the sale of said machines, twine, binder trucks, bundle carriers, flax dumps, repairs, or other property, whether for this or previous years, and may at any time annul and determine this and all other prior contracts, and take possession of all orders, notes, accounts, moneys, machines, twine, binder trucks, bundle carriers, flax dumps, repairs, and other property in the hands of said Merriman Brothers & Company, by virtue hereof."

Early in March, 1893, the plaintiffs began to canvass and take orders for the delivery of binders and mowers, and up to the 22d day of March had obtained twenty-nine orders in writing. Upon the 22d day of March the general agent of the company annulled and determined the contract, and gave written notice of such annulment to the plaintiffs. At

the time said contract was annulled none of the machines had been delivered to any of the purchasers, except one machine upon order No. 14, which had been delivered to the purchaser, and, after the cancellation of the contract, the company received the note of the said purchaser in the sum of $135 therefor. Prior to the cancellation of the contract, the defendant had shipped to the plaintiffs, and the plaintiffs had received and stored, at London, Dane county, nine harvesters and twelve mowers, upon which the plaintiffs had advanced freight amounting to $48.18, which by one of the provisions of the written agreement of agency the defendant was to pay. At the time when the contract was canceled, there was a personal interview between the plaintiffs and the general agent of the defendant, and said general agent demanded that the plaintiffs deliver up the twenty-nine orders for machines. The plaintiffs, however, refused to deliver the same, and claimed them as their own. The plaintiffs also refused to deliver the machines and other property of the defendant then in their possession, and on the same day the defendant took possession of all of its machines and other property, whether at Ft. Atkinson or at London. The plaintiffs never delivered, set up, or started any of the machines mentioned in the orders, nor instructed the purchasers how to work the same. At the time of the cancellation of the contract, the general agent of the defendant offered to settle with plaintiffs for what they had done in pursuance of the contract, but the agents refused to settle. The defendant sent out new agents, and did in fact deliver machines to a large number of the persons who had given their orders for machines to the plaintiffs, but just how many of such orders were so filled does not appear. The plaintiffs within a few days secured the agency of another reaper, and made some efforts to furnish other machines of a different make to the parties who had ordered McCormick machines, and in fact did replace four of the McCormick machines so ordered with other machines.

At the time of making the agency contract, the plaintiffs filed with the general agent of the defendant two orders for binding twine at certain fixed prices,—one for 25,000 pounds, to be shipped on or about the 1st day of May, 1893, and another of like amount to be shipped upon order. These orders were made subject to approval at the defendant's Chicago office, and on the 5th day of January, 1893, the plaintiffs ordered from defendant one fifty-pound sack of each kind, making 150 pounds in all, and the same was shipped to them February 18, 1893, with the following notation upon the bill: "Terms as per contract." On the 23d day of March, 1893, the plaintiffs ordered a car load to be shipped, but the defendant refused to fill the order, and notified plaintiffs that they declined to fill any orders for twine.

The referee found that the plaintiffs were entitled to recover their commissions upon the sale of twenty-six machines, amounting to $708.11; that the plaintiffs were also entitled to recover damages for the defendant's failure to furnish certain bundle carriers and trucks, which the plaintiffs ordered, in the sum of $20; that the defendant was indebted to the plaintiffs in the sum of $224.16 on account of the failure to furnish the car load of binding twine; that the defendant was also indebted to the plaintiffs in the sum of $48.18 on account of freight paid; that the plaintiffs were indebted to the defendant in the sum of $57.47 for the expenses of expert canvassers furnished plaintiffs by defendant prior to the cancellation of the contract.

These conclusions of the referee were entirely set aside by the circuit court, which concluded, upon substantially the same facts as found by the referee, that plaintiffs were not entitled to any commissions upon any of the orders taken, except upon the one note before mentioned, where the machine had been shipped before cancellation; that the twine contract was never in fact a contract valid in law between the parties, because it was for goods of greater value than $50, and was not in writing, subscribed by defendant; that

no damages accrued to plaintiffs on account of nondelivery of said twine, because the price thereof did not advance any from December 5, 1892, to April 1, 1893; that the defendant was indebted to the plaintiffs at the time of the commencement of this action on account of freight paid in the sum of $48.18, and on account of commissions upon the sale of one machine $31.05, making a total of $79.23; and that the plaintiffs were indebted to the defendant for the necessary expenses of expert canvassers in the sum of $57.47, which, being offset against $79.23, left a balance due plaintiffs at the commencement of the action of $21.76, for which sum judgment was rendered for the plaintiffs, and the plaintiffs appealed.

L. B. Caswell and *W. H. Rogers*, for the appellants.

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *J. V. Quarles*.

WINSLOW, J. There was no very serious dispute as to the facts of the case, nor is there any very material difference between the findings of fact made by the referee and those made by the circuit judge (except with regard to the failure to fill the order for binding twine, which will be considered later); but there was a radical difference between the legal conclusions resulting from the facts. The referee was of opinion that the plaintiffs were entitled to recover their full commissions upon all machines for which they had taken orders, except where they afterwards furnished a different machine; while the circuit judge concluded that they were entitled to no compensation for their services in obtaining the orders, save for the one machine delivered before the cancellation of the contract.

We find ourselves unable to agree with either conclusion. We think, under the provisions of the contract, the plaintiffs were entitled to recover the reasonable value of their services in obtaining the orders for machines which were

afterwards actually filled with McCormick machines, and no more. The reason for this conclusion we will briefly state. The contract provides for a certain commission upon the sale of each machine, which is to be earned, not by obtaining the order alone, but by receiving and housing the machine, setting it up and running it, instructing the purchaser, receiving and transmitting the money or notes therefor, and by rendering other services connected with the sale. Manifestly the contract is entire as to each commission, and is not earned except by the performance of all the requirements. Furthermore, there is a special provision that commissions shall only be paid on machines sold and settled for, and none shall be paid on orders *not filled.* Had the plaintiffs brought action for their commissions after taking the orders and prior to the cancellation of the contract, it is very certain that they could not recover them, because they had not been earned, nor could they have recovered upon *quantum meruit*, because the contract is an entire contract as to each commission. Now the theory upon which the referee allowed the entire commission was that by the cancellation of the contract the defendant had rendered it impossible for the plaintiffs to carry it out, and hence that they ought to recover the full commission, because they were ready to carry it out, but were prevented by the defendant from doing so.

The well-settled rule is that when a contractor's performance is stopped by the *fault* of the employer, he may recover upon *quantum meruit* for what he has done, and also may recover damages for being prevented from completing the work. 2 Suth. Dam. (2d ed.), § 713. But this second element of damages, i. e. the damages resulting from being prevented from completing the work, are plainly given because of the wrongful stoppage of the work. Where the stoppage is absolutely rightful and in strict accord with contract provisions, there can be no damages, because damages do not

arise from the proper exercise of a legal right. Now in the present case the parties had agreed that the defendant might *at any time* end the contract, and take into its possession all *orders, notes, accounts, moneys, machines,* or other property of the defendant in the hands of the plaintiffs. The provision is certainly very drastic, but it is admittedly a part of the contract, and no claim of fraud or mistake is made with reference to it. Under these circumstances the court's duty is simply to construe it. It was put in the contract with a definite purpose, and that purpose plainly was to give the defendant power to end the agency at any time and place the entire business in other hands. This power must be reasonably construed. It should not be construed as depriving the plaintiffs of reasonable remuneration for their services already rendered in obtaining orders which are afterwards filled with McCormick machines, but it certainly must be construed as authorizing the defendant lawfully to end the agency at any time, and thus rightfully to prevent the earning of the full commissions. It was certainly the duty of the plaintiffs to surrender up the orders they had taken to the defendant when the contract was canceled. Not only does the contract provide that they shall do so, but it further provides that they shall not retain any of defendant's property in their hands as security for commissions. We do not think, however, that, where it can be shown that any such order was afterwards actually filled with a McCormick machine, this failure of duty should prevent the plaintiffs from recovering the reasonable value of their services in obtaining the order. As it cannot be ascertained from the evidence just how many of the orders taken were afterwards filled with McCormick machines, nor what the reasonable value of the preliminary canvassing and procuring of such orders was, further testimony must needs be taken upon these questions.

We see no need of disturbing the conclusions of the cir-

cuit court as to the binding twine. While we think that the contract was a binding one, made so by the delivery and acceptance of a part of the goods, still the finding that the price of twine remained unchanged from December, 1892, until April 1, 1893, is founded upon sufficient evidence, and we shall not disturb it. This being the case, the refusal to fill the order for a car load of twine, made March 23, 1893, produced no damage.

It will not be necessary to retry the case. The court below can ascertain by additional testimony, taken either in open court or before a referee, how many of the orders taken were filled with McCormick machines, and what was the reasonable value of plaintiffs' services in obtaining such orders. For this sum the plaintiffs will be entitled to credit, as well as for the sum of $48.18 for freight advanced. The defendant will be entitled to credit for $57.47, being for expenses of expert canvassers who assisted the plaintiffs. The party having the greater credit will be entitled to judgment for such excess. The case will not be reopened further than above indicated.

By the Court.—Judgment reversed, and action remanded for further proceedings in accordance with this opinion.

LITTLEWOOD'S WILL.

June 11—June 24, 1897.

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Wills: Construction.

To a will bequeathing all the testator's estate to his wife and appointing her guardian of his son and executrix, there was added, just before the signature, the words "but if one or the other dies, the one that survives the other, take it all." *Held*, that the widow took a life estate which would merge into a fee in case she survived the son, with remainder to the son in case he survived her. *Lovass v. Olson*, 92 Wis. 616, distinguished.

APPEAL from a judgment of the circuit court for Rock county: JOHN R. BENNETT, Circuit Judge. *Affirmed.*

The facts are stated in the opinion.

The cause was submitted for the appellant on the brief of *Wickhem & Ingersoll* and *E. D. McGowan*, and for the respondent on a brief signed by *George G. Sutherland*, guardian *ad litem*, and *Sutherland & Nolan*, attorneys.

Counsel for the appellant contended, *inter alia*, that all of the estate is given to *Mrs. Littlewood* for her sole use and benefit, and no condition or limitation is annexed to the gift. This language is so broad that it carries a fee, and a remainder over is void for repugnancy. 2 Redf. Wills, 278; *Stowell v. Hastings*, 59 Vt. 494; *Rodenfels v. Schumann*, 45 N. J. Eq. 383; *Hall v. Palmer*, 87 Va. 354; *Judevine's Ex'rs v. Judevine*, 61 Vt. 587; *Downey v. Borden*, 36 N. J. Law, 460, 466; *Jones v. Bacon*, 68 Me. 34, 28 Am. Rep. 1, and note; *Mitchell v. Morse*, 77 Me. 423. An estate granted in clear terms is not cut down by subsequent words of the will unless they are equally as clear and decisive as those by which the estate was created. 29 Am. & Eng. Ency. of Law, 369; *Roseboom v. Roseboom*, 81 N. Y. 356; *Washbon v. Cope*, 144 id. 287; *Benson v. Corbin*, 145 id. 351; *Hochstedler v. Hochstedler*, 108 Ind. 506; *Bailey v. Sanger*, id. 264; *Hall v. Palmer*, 87 Va. 354; *Wilmoth v. Wilmoth*, 34 W. Va. 426; *Rona v. Meier*, 47 Iowa, 607; *Killmer v. Wuchner*, 74 id. 359; *Haight v. Pine*, 3 App. Div. 434; *Mitchell v. Morse*, 77 Me. 423; *Wallace v. Hawes*, 79 id. 177. Even if the clause in question has any meaning it only refers to the death of *Mrs. Littlewood* during the lifetime of the testator. Schouler, Wills (2d ed.), § 565; *Lovass v. Olson*, 92 Wis. 616; *Washbon v. Cope*, 144 N. Y. 287; *Benson v. Corbin*, 145 id. 351; *Stevenson v. Fox*, 125 Pa. St. 568; *Antioch College v. Branson*, 145 Ind. 312; *Vaughn v. Cator*, 85 Tenn. 302; *Webb v. Lines*, 57 Conn. 154.

WINSLOW, J. This is a proceeding to construe a will. James Littlewood died, leaving a widow and son surviving, and a will, the material parts of which are as follows:

"I hereby give and bequeath to my beloved wife, *Mary E. Littlewood*, for her sole benefit, all of my estate, real and personal, of every kind and nature whatsoever. I hereby appoint my wife, *Mary E. Littlewood*, the guardian of the person of my beloved son, George Littlewood, and of the estate, and appoint her, *Mary E. Littlewood*, the executor of my last will, and desire that no bonds shall be required of *Mary E. Littlewood* as executor or guardian.

"In witness hereof I have set my hand and seal this (6th) sixth day of April, 1891, but if one or the other dies, the one that survives the other, take it all.

"JAMES LITTLEWOOD."

This will was construed by the circuit court as giving the widow a life estate, which will be merged in a fee in case of the death of the son during her life, and, in the event of the widow's death prior to that of her son, as vesting the remainder in fee simple in the son. From this judgment the widow appeals, claiming that the will gives her an estate in fee.

We think the construction given to the will is correct. A will is to be construed so as to give effect to the intent of the testator, if it can be gathered from the whole instrument. In the present case it is true that the language of the first paragraph would give the widow an estate in fee, but it seems very clear that the final clause controls, and was meant to control, the language of the previous gift. This clause was added just before the signature, and evidently with a purpose. Its language is not technical or artificial, but its purpose is plain, and that purpose was to provide that the survivor of the two beneficiaries should take a fee upon the death of the other. This purpose is so plain and palpable

that we think it must control the language of the first clause. This conclusion does not trench upon the decision in the case of *Lovass v. Olson*, 92 Wis. 616, where it was held that "where there is a devise to one person in fee, and, in case of his death without issue, to another, the death referred to is death during the lifetime of the testator, unless there is language in the will which gives fair, clear, and reasonable ground for saying that the testator had a different intention." Conceding that this rule applies to the present case, we are satisfied that the language of the entire will clearly shows that the testator contemplated that both his wife and his son would survive him, and that the death which he referred to was a death after his (the testator's) death.

By the Court.—Judgment affirmed.

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BLAKELY, Respondent, vs. SMOCK and others, Appellants.

June 11—June 24, 1897.

Partnership: Accounting: Estates of decedents: Claims: Limitation: Misjoinder of causes of action.

1. Until there has been an accounting and settlement of partnership affairs one partner can have no claim against the estate of a deceased partner, growing out of the state of the partnership accounts, which is enforceable against the heirs of the latter under sec. 3274, R. S., or which will be barred by sec. 3844 if not seasonably presented to the probate court.
2. A cause of action for the settlement of partnership accounts cannot be joined with one to recover from the heirs of a deceased partner the balance found due the plaintiff, since one is purely equitable and the other purely legal, and the parties are not the same.

APPEAL from a judgment of the circuit court for Green county: JOHN R. BENNETT, Circuit Judge. *Reversed.*

The plaintiff, *Leroy S. Smock*, and J. Smith Smock were partners in business for several years. In the year 1888 the

firm ceased doing business, and all its assets were applied to the payment of its debts. After the application of all the assets, several firm debts, of considerable amount in the aggregate, remained unpaid. J. Smith Smock died. His estate was fully administered and settled. His debts were paid from his personal estate, and his real estate was assigned among his heirs. The firm debts were not made claims against his estate, and no part of them were paid from it. Afterwards the plaintiff paid the firm debts. He brings this action to recover from the heirs of J. Smith Smock the amount which he claims would be due to him from J. Smith Smock on settlement of the partnership transactions. The right of action is based upon sec. 3274, R. S. There has never been a settlement of the partnership transactions and accounts. The complaint sets out the condition of the partnership account as the plaintiff claims it, and asks judgment that it be adjusted and fixed as there stated, and that the claim of the plaintiff, as so fixed and adjusted, be made a lien upon the lands which descended to the defendants from their ancestor, J. Smith Smock. A demurrer *ore tenus* to the complaint was overruled, and a trial had, which resulted in a judgment for the plaintiff, substantially in accordance with the demand of his complaint. From this judgment the defendants appeal.

For the appellants there was a brief by *J. D. Dunwiddie* and *B. F. Dunwiddie*, and oral argument by *B. F. Dunwiddie*. To the point that the claim in suit is not a contingent claim within the meaning of sec. 3858, R. S., they cited *Austin v. Saveland's Estate*, 77 Wis. 108, 114; *French v. Hayward*, 16 Gray, 512; *Cummings v. Thompson*, 7 Met. 134; *Ernst v. Nau*, 63 Wis. 134; *Sargent's Adm'r v. Kimball's Adm'r*, 37 Vt. 320; *Alexander v. Follett*, 5 N. H. 499; *Sears v. Wills*, 7 Allen, 430.

For the respondent there was a brief by *A. S. Douglas* and *Fethers, Jeffris, Fifield & Mouat*, and oral argument by *M. G. Jeffris*.

NEWMAN, J. The question which is decisive of this appeal is whether the demurrer *ore tenus* was properly overruled. If the complaint states a cause of action in favor of the plaintiff and against the defendants as heirs of J. Smith Smock, then there can be no question that the proof establishes such cause of action as is pleaded. The more definite question is whether the complaint states such facts as show that the plaintiff had a claim against J. Smith Smock, which he is entitled to enforce against his heirs under sec. 3274, R. S. The point chiefly in debate was whether action on plaintiff's claim was barred because not presented to the probate court and allowed against the estate. It was urged that plaintiff's claim was taken out of the operation of the statute (sec. 3844) by the fact that it was only a contingent claim, and not a proper claim to be allowed. If it was in truth a contingent claim, which did not become absolute during the time when the estate was in process of settlement, then the case does not come within the bar of the statute. *Mann v. Everts*, 64 Wis. 372. There is a sense in which it may be said, perhaps, that the plaintiff had a claim against the estate of J. Smith Smock, contingent on the happening of certain conditions. If, on an accounting and settlement of the partnership transactions, something should be found due from the partnership to the plaintiff, and also something should be found due from J. Smith Smock to the partnership, and there should be a substitution of debtors, on the happening of all these contingencies the plaintiff would become a creditor of the estate of J. Smith Smock. Possibly it could be said that before these contingencies happened he was a creditor with a contingent claim, within the meaning of the statute. The question is not important in this case, for the contingencies have not happened. There has been no accounting and settlement of the partnership affairs. Until such settlement, whatever is due from each partner is due to the partnership, and whatever is due to a partner is due from the partnership. *Sprout*

v. Crowley, 30 Wis. 187; *Smith v. Diamond*, 86 Wis. 359; *Pendleton v. Beyer*, 94 Wis. 31; Bates, Partnership, § 849, and cases cited in note. So, it cannot, with precise accuracy, perhaps, be said that before such accounting and substitution of debtors the plaintiff had any claim at all against the estate of his copartner. It was, indeed, little more than a possibility of a claim.

It is not, indeed, claimed that there has been a settlement of the affairs of the partnership. But such settlement is sought in this action, and that the balance found due from the partnership to the plaintiff be made a lien upon the real estate which the defendants inherited from his copartner. This seems to be a misjoinder of incongruous causes of action. They are not such as it is permissible to join under sec. 2647, R. S. They do not belong to the same class, as therein defined, nor affect all the parties to the action. A purely legal cause of action under the statute is joined with one purely equitable, and requiring different parties. To the legal cause of action the heirs of J. Smith Smock are necessary parties. To the equitable cause of action they are not even proper parties, while the representatives of J. Smith Smock are necessary parties, without whose presence no judgment can be rendered which shall in any way affect his estate. *Fuller v. Benjamin*, 23 Me. 255; *Jenness v. Smith*, 58 Mich. 280; Bates, Partnership, § 931. The representatives of J. Smith Smock are not parties to the action. So, no judgment in the action, by way of an accounting, could be binding upon his estate, or be the basis of new rights in the plaintiff in his estate. Even if it should be deemed that the plaintiff had a contingent claim against the estate, such claim remains contingent, and has not become absolute.

On these considerations, it seems clear that the complaint fails to show that any claim or right of action against the estate of J. Smith Smock has accrued to the plaintiff, or

any claim to be enforced against the lands which the defendants have inherited from him. The complaint does not state a cause of action. The demurrer *ore tenus* should have been sustained.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for further proceedings according to law.

ROTH, by guardian *ad litem*, Appellant, vs. S. E. BARRETT MANUFACTURING COMPANY, Respondent.

June 11—June 24, 1897.

Master and servant: Presumption of average intelligence: Injury to minor feeding straw cutter: Assumption of risk: Court and jury.

1. Unless apprised to the contrary, a master has the right to assume that a boy eighteen years of age is possessed of average intelligence for a person of his years.
2. A boy of average intelligence, eighteen years of age, who is put at work pushing straw into a straw cutter with a stick, will be presumed, as a matter of law, to know and appreciate the danger of getting his fingers caught in the rolls and being injured thereby, and his evidence to the contrary does not raise a question for the jury.

APPEAL from a judgment of the circuit court for Rock county: JOHN R. BENNETT, Circuit Judge. *Affirmed.*

Action for personal injuries alleged to have been caused by negligence on the part of the defendant. Defendant owned and operated a straw-board factory. It purchased straw from one Hansel, to be delivered by him at the factory, and put through a cutting machine. Plaintiff was employed by Hansel to aid in taking straw from loaded wagons, and putting it through the cutting machine. It required two persons to do the work,—one to pitch straw from the load to a straw carrier, by which the material was conveyed to a

table; then it was pushed by the second man into revolving rolls by which it was carried to knives behind such rolls, which cut it up fine. The machinery of the straw cutter was of the ordinary kind. The knives were, as usual, hid from view by the rolls and the covering over the same. The feeder, in doing his work, was required to stand at the side of the table, and with a short, pointed stock about six inches long, grasped in the left hand, push the straw toward the rolls by putting the stick from time to time down through the straw as it lay on the table, and then move it along till the rolls would engage it, and carry it through to the knives. Plaintiff, while doing this work, got his fingers caught between the rolls, whereby his arm was drawn in and destroyed. The negligence complained of was that plaintiff was an inexperienced boy, to the knowledge of the defendant, and that it neglected to inform him of the dangers attending the work of feeding the cutter, and to furnish him a stick of the proper length to shove the straw along with. Defendant interposed as an answer a general denial. At the close of plaintiff's evidence the court granted a nonsuit, and from the judgment thereupon entered this appeal was taken.

For the appellant there was a brief by *Fethers, Jeffris, Fifield & Mouat*, and oral argument by *C. L. Fifield* and *M. G. Jeffris*.

C. H. Van Alstine, counsel, for the respondent, to the point that the plaintiff assumed the risk as matter of law, cited *Casey v. C., St. P., M. & O. R. Co.* 90 Wis. 113, 117; *Pratt v. Prouty*, 153 Mass. 333; *Sanborn v. A., T. & S. F. R. Co.* 35 Kan. 292; *Berger v. St. P., M. & M. R. Co.* 39 Minn. 78; *McMahon v. O'Donald*, 32 Neb. 27.

MARSHALL, J. The grounds for the nonsuit, we apprehend, in the main were: First, that the plaintiff was injured through his own carelessness; second, that no actionable negligence on the part of the defendant was shown; third, that the boy

was a servant of Hansel, and that, if there was any negligence in setting him at work without furnishing him a proper stick for use in pushing the straw into the rolls, or without instructing him in regard to the dangers attending the employment, it was the fault of Hansel, and not of the defendant. Either of these grounds was sufficient to justify the nonsuit.

The young man appears to have possessed average intelligence for a person of his years. At least the evidence does not show that the defendant was apprised to the contrary before the accident. Therefore it had a right to assume that the boy was possessed of the usual faculties ordinarily developed. In short, that he was a person of ordinary common sense for one of his years, and that he would exercise such care to avoid the dangers which were visible, and which he knew, or ought to have known, existed, as might reasonably be expected of one of his years and capacity. *Klatt v. N. C. Foster L. Co.* 92 Wis. 622.

There was nothing complicated about the machine at which the boy was working. We must assume that he knew of the existence of the rolls, and knew that if he got his fingers between them the probable result would be a serious injury. Affirmative evidence was not necessary to establish these facts. Nevertheless, the boy testified in answer to questions propounded by the court, in effect, that he knew that the rolls carried the straw through to knives that cut it up fine. True, he also said that he did not know there was danger of his hand being caught by the rolls, and he did not know that if it was caught he would be injured; but such evidence does not change the situation. There was no more skill required in pushing the straw into the rolls than in putting wood into an ordinary stove. It could hardly be said of a young man eighteen years of age, if, while in the act of performing such an ordinary operation as feeding a stove, he got his hand too near the fire and was

burned, that he was not chargeable with knowledge of whatever danger existed that such might be the result. If such an accident happened, his evidence that he did not know or appreciate the danger would so conflict with and be overcome by common experience in life and all the probabilities as not to raise a question of fact for determination by a jury. It has been repeatedly held that evidence from the mouth of a witness to the existence of a fact, contrary to all reasonable probabilities, does not raise a question for submission to a jury, as in *Groesbeck v. C., M. & St. P. R. Co.* 93 Wis. 505, and *Lenz v. Whitcomb, ante*, p. 310, in each of which cases ordinary care required plaintiff to look for a coming train before entering upon a railway track. The train was in plain sight from where he was approaching the track. He testified that he looked and did not see it, and the court held that such testimony was not entitled to any consideration as against the conclusive presumption, arising from the circumstances of the situation, that he either did not look or that he saw the train and proceeded negligently to the danger. Also in *Badger v. Janesville Cotton Mills*, 95 Wis. 599, where a person, working on a ladder capable of sustaining several times his weight at the place where, after he was injured, it was found broken, testified that such breaking was caused by the weight upon it, and the court held that the fact that the ladder was free from all discoverable defects, and was sufficiently strong to sustain several times plaintiff's weight, rendered a breaking as testified to by him so improbable that his testimony did not raise any question in that regard for the jury. Also in *Vorbrich v. Geuder & Paeschke Mfg. Co., ante*, p. 277, where a machine by which plaintiff was injured was so constructed that pressure upon a lever was indispensable to its operation, and plaintiff testified that it moved unexpectedly and without such pressure, causing his injury, and it was held that such testimony did not create any conflict with the conclusive

presumption arising from the mechanical construction of the machine that an operation as testified to was impossible. So in this case, for a young man in his nineteenth year to testify that he did not know that, if he got his fingers into the rolls of a straw cutter, they would be caught thereby, and did not know that, if they were caught, he would be injured, does not amount to even a scintilla of evidence tending to establish that such were the facts. It follows that the boy needed no instruction in respect to how to do his work, and that the evidence conclusively shows that the injury complained of was either purely accidental or the result of the boy's own negligence. Therefore there is no legal ground to justify shifting the loss to the defendant, which is not shown to have been guilty of any actionable fault.

By the Court.—The judgment of the circuit court is affirmed.

MONITOR MANUFACTURING COMPANY, Respondent, vs. JONES, Assignee, Appellant.

June 12—June 24, 1897.

Contracts: Agency: Conditional sale or consignment on commission?

Contracts appointed N. as agent "for the sale, on commission," of plaintiff's machines, fixed the commission at the amount received above net prices quoted, and ordered certain machines to be shipped on or before a certain date, to be paid for "one half six months, balance eighteen months, in farmers' notes," final settlements to be made on certain dates, and discounts made for cash. They also provided, among other things, that all machines and their proceeds were to remain the property of plaintiff until so settled and paid for; that settlement should be made at any time on demand of plaintiff, and the entire proceeds of sales turned over to it; that the plaintiff should pay N. his commission from such proceeds; that all notes, taken in payment for machines, which did not comply with the terms of the contract should be applied on N.'s commission; that N. should pay the plaintiff fifty per cent.

of all losses by reason of uncollectible notes, upon their being assigned to him; and that he should pay all freight, taxes, and insurance on machines ordered, and all damages sustained to them by reason of their not being properly housed. *Held*, that the contracts called for consignments of goods to be settled for out of the proceeds of sales, and were not contracts of conditional sale.

APPEAL from a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Affirmed.*

Action of replevin for a lot of agricultural implements. The implements were manufactured by the plaintiff corporation, and placed in the hands of the firm of J. A. North & Sons for sale under several agency contracts, the essential parts of which contracts were all substantially alike, and were as follows:

"*Monitor Manufacturing Co.*, of Minneapolis, Minn., and J. A. North & Sons, of Fox Lake, county of Dodge, state of Wisconsin, agree and contract, to wit: Said company hereby appoints said J. A. North & Sons as its agent or agents for the sale, on commission, of its machines, until all goods shipped under terms of this contract are sold or turned over to *Monitor Manufacturing Co.*, which shall be done on the latter's order.

"Said J. A. North & Sons accept the agency, and agree to the conditions of this contract. Said agent or agents are to solicit for orders thoroughly in the following described territory, and in such territory only:

"Fox Lake and vicinity.

"*Monitor Manufacturing Co.* agree to furnish said agency with machines as follows, and as ordered up to October 1st, 1895, the commission to consist of amount received above the following net prices. [Here follows a list of the machines and prices.]

"Said agent or agents desire goods ordered above to be shipped on or about Feb. 1st, 1895, *on terms, one half six months, balance eighteen months, in farmers' notes, with legal*

rate of interest if paid at maturity; if not so paid, interest at highest legal contract rate from April 1, next, on spring sales, and Sept. 1, next, on fall sales. Final and complete settlement for all spring sales shall be made on or before May 1, next, and for all fall sales on or before Oct. 1, next. For notes maturing first fall, or in six months, in excess of same amount due second fall, or eighteen months, acceptable to Monitor Manufacturing Co. in settlement, a discount of five per cent. will be allowed. Cash discount ten per cent. up to July 1, 1895.

"All machines and their proceeds shall remain the property of the *Monitor Manufacturing Co.* until so settled and paid for.

"Retail prices to be governed by *Monitor Manufacturing Co.'s* printed blank orders. On each sale one of said orders to be filled out with a true property statement, and times of payment.

"*Sales to be made to good and responsible parties only.* All notes to be drawn to the order of *Monitor Manufacturing Co.* Said agent or agents agree to render at time of settlement, to *Monitor Manufacturing Co.*, a true statement of all sales, and to have on hand the entire proceeds of each and every sale, and to deliver to *Monitor Manufacturing Co.* or its authorized agent, such complete proceeds, from which said company shall pay said agent or agents the commission due on sales, such payment to be *pro rata* in cash or notes in proportion of the commission to the net prices above given. Sales made by trade, other property than notes being received, shall be considered same as cash sales. In case notes tendered to *Monitor Manufacturing Co.*, as proceeds of sale, do not each contain a true property statement of at least $1,000 over and above all indebtedness and exemptions, or, in lieu of this statement, are not each secured by first mortgage, duly executed and recorded, on property of $300 market value, said company shall not be bound to accept such notes, but the agent or agents hereby agree to

accept them to apply on his or their commissions. However, be it understood that in no case shall the represented value of notes not complying with the conditions of this contract exceed agent's commission.

"On any sale or sales made by said agent or agents under this contract that prove a partial or total loss by reason of the uncollectibility of notes, said agent or agents agree to pay to *Monitor Manufacturing Co.* fifty per cent. of the loss on such notes, payment to be made either in cash or notes acceptable to *Monitor Manufacturing Co.*, whenever said company transfer to the agent or agents the claim or claims on which settlement by virtue of this agreement is demanded.

"Said agent or agents agree to receive and pay freight on all machines shipped, taxes, insurance, and all damages sustained to the machines by their not being properly housed, on all machines carried that he or they may have ordered. If *Monitor Manufacturing Co.* relieve said agent or agents of any machines, said agent or agents agree to put machines aboard cars free of charge, and will also pay at settlement as much as the difference between place of reshipment to the point shipped, so as to make it equal to freight from factory.

"Said agent or agents to sell the machines subject to the regular warranty furnished, and not to engage in the sale of other machines of the same kind during the term of this contract. *Monitor Manufacturing Co.* agree to use its best efforts to ship all machines ordered, but shall not be held responsible to said agent or agents in case the demand exceed the supply.

"At the request of *Monitor Manufacturing Co.* complete returns of all machines delivered on this contract shall IMMEDIATELY be sent to said company.

"A commission of twenty per cent. allowed on the sale of repairs, excepting rubber grain-drill tubes, which are furnished on net cash terms. All repairs to be settled for in cash.

"All 12 Bar P. F. seeders sold net cash July 1, 1895, $31.00 each.

"Freight equal to Beaver Dam.

"Notes in our favor turned over to agents as commission must be sent to our office for indorsement. Our road representatives have no authority to indorse notes in our name.

"MONITOR MANUFACTURING CO."

The firm of North & Sons afterwards made a voluntary assignment for the benefit of creditors to the defendant, *Jones*, who duly qualified, and took possession of the property as such assignee. The plaintiff demanded the property from *Jones*, who refused to deliver it, claiming to hold it rightfully as assignee of North & Sons. Thereupon this action was brought, and, the above facts appearing without dispute, and the value of the property being agreed upon, the court directed the usual replevin verdict to be rendered in favor of the plaintiff, and from judgment thereon the defendant appealed.

For the appellant there was a brief by *Malone & Bachhuber*, and oral argument by *J. E. Malone*. To the point that the assignor held the goods under a conditional sale, they cited *Harkness v. Russell*, 118 U. S. 663; Benjamin, Sales (4th ed.), §§ 329–336; 21 Am. & Eng. Ency. of Law, 628, 630; *Sumner v. Woods*, 67 Ala. 139; *S. C.* 42 Am. Rep. 104; *Peters v. Fetherstun*, 61 id. 466; *Thomas v. Parsons*, 87 Me. 203; *Norwegian Plow Co. v. Clark*, 70 N. W. Rep. 808; *Bentley v. Snyder*, 69 id. 1023; *Moline Plow Co. v. Braden*, 71 Iowa, 141; *Kellam v. Brown*, 112 N. C. 451; *Chickering v. Bastress*, 130 Ill. 206; *Mack v. Drummond Tobacco Co.* 48 Neb. 397; *Aspinwall Mfg. Co. v. Johnson*, 97 Mich. 531; *Peoria Mfg. Co. v. Lyons*, 153 Ill. 427.

C. E. Hooker, for the respondent.

WINSLOW, J. The defendant's contention is that the contracts under which the implements were placed in the hands

of North & Sons were in fact contracts of conditional sale of the machines, and hence void as to all persons save the parties and those having actual notice thereof, because they were never filed in the office of the town or village clerk, as required by sec. 2317, R. S. This is the only substantial contention made, and, if it fails, the judgment must be affirmed.

Careful perusal of the contracts convinces us that they were commission contracts in legal effect, and not contracts of conditional sale. The contracts are quite similar in their terms to the contract which was under consideration in *Williams M. & R. Co. v. Raynor*, 38 Wis. 119, and which was held to be an agency or commission contract; and much that is there said applies with equal force to this case. The controlling question undoubtedly is whether the contract provides for consignments of goods to be settled for at fixed prices out of the proceeds of the goods when sold, or whether, under the terms of the contract, the alleged consignee is in fact a purchaser, and becomes liable for the goods, when sold, as a principal debtor; and these questions are to be determined not so much by the words used as by the evident intent and legal effect of the provisions. Scrutinizing the various provisions as carefully as possible, we conclude that the contract before us calls for consignments of goods to be settled for out of the proceeds of sales, and does not make the consignees purchasers of the goods.

By the Court.—Judgment affirmed.

McCUE, Appellant, vs. THE CITY OF WAUPUN, Respondent.

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June 12 — June 24, 1897.

(1) *Municipal corporations: Disallowance of claim for personal injuries: Failure to appeal.* (2) *Failure to find on plea in abatement: Immaterial error.*

1. Under the general law for the incorporation of cities (ch. 326, Laws of 1889, as amended by ch. 312, Laws of 1893), providing, in secs. 58–60, that no action shall be maintained against a city organized thereunder "upon any claim or demand *of any kind or character whatsoever,*" unless it shall have been first presented to the common council and disallowed in whole or in part, and that the action of the council thereon shall be conclusive unless appealed from within twenty days, failure to appeal from the disallowance of a claim for personal injuries within the prescribed time constitutes a bar to an action to recover therefor.
2. Where the same matter is pleaded both in abatement and in bar, the direction of a verdict for the defendant on the plea in bar, after trial on the merits, without finding on the plea in abatement, is not error prejudicial to the plaintiff.

APPEAL from a judgment of the circuit court for Dodge county: WARHAM PARKS, Circuit Judge. *Affirmed.*

This was an action to recover against the defendant city damages the plaintiff claimed to have sustained by reason of a personal injury occasioned by the defendant's alleged neglect to supply him with good, safe, and suitable tools and implements while working in its employ as a laborer on a certain street in the city; in consequence of the unsafe, defective, and insufficient character of which said tools and implements, on the 18th of August, 1893, he was greatly injured while so working upon such street. The defendant answered by way of abatement, and also in bar, that the plaintiff's said claim had been presented to the common council for allowance April 13, 1894; that on the 3d of July, 1894, the defendant city adopted, as authorized by law, the provisions of sec. 58, ch. 326, Laws of 1889, as amended by sec. 27, ch.

312, Laws of 1893, and the provisions of secs. 59 and 60 of said ch. 326; that on September 1, 1894, the common council disallowed said claim, and the plaintiff did not appeal from said decision of disallowance within twenty days thereafter, whereby his claim for said alleged injuries became and was barred before this action was commenced. There was a general denial of the allegations of the complaint, and it was alleged that the plaintiff was guilty of contributory negligence on his part. Evidence was given, showing the truth of the special matters so pleaded in abatement and in bar, and as well upon the other issues in the case. At the close of the evidence the court directed a verdict for the defendant, upon which the defendant had judgment, and from which the plaintiff appealed.

For the appellant there was a brief by *Malone & Bachhuber*, and oral argument by *J. E. Malone*. To the point that the failure to find on the plea in abatement was error, they cited *Brown Co. v. Van Stralen*, 45 Wis. 675; *S. C.* 46 id. 374; *Tomlinson v. Nelson*, 49 id. 679; *Jernigan v. Carter*, 51 Ga. 232; 1 Ency. of Pl. & Pr. 35.

C. E. Hooker, for the respondent.

PINNEY, J. By sec. 58, ch. 326, Laws of 1889, as amended by sec. 27, ch. 312, Laws of 1893, it was provided that "no action shall be maintained by any person, against any city organized under the provisions of this act, upon any claim or demand *of any kind or character whatsoever*, until such person shall have first presented his claim or demand to the common council for allowance, and the same shall have been disallowed, in whole or in part;" and sec. 59, ch. 326, Laws of 1889, provides that "the determination of the common council disallowing in whole or in part any claim shall be final and conclusive, and a bar to any action in any court founded on such claim, unless an appeal be taken from the decision of such common council, as in this act provided." By

sec. 60 the time to appeal from such disallowance is limited to twenty days after making such decision or disallowance. The amendment to said sec. 58 consisted wholly of incorporating in the section the words above in italics, "of any kind or character whatsoever." These statutory provisions became and were, at the time of the disallowance of the plaintiff's claim, a part of the charter of the defendant city. The provisions of sec. 58, thus adopted, as at first enacted and before amended as above stated, were substantially the same as those of the charter of the city of Madison, construed in *Kelley v. Madison*, 43 Wis. 638, where the general meaning of the words "any claim or demand" was held to be so limited and restrained by other provisions of the charter in respect to the filing and allowance of accounts or demands that these words could not be held to include a cause of action in tort, and a more limited meaning was accordingly given to them. But for the amendment to sec. 58, by which the phrase "any claim or demand" was extended so as to read "any claim or demand of *any kind or character whatsoever*," this case would be ruled by that of *Kelley v. Madison, supra.* The section, as thus amended and adopted by the defendant, is very broad and comprehensive, and was evidently designed to change the rule of *Kelley v. Madison*, and to bring within its language claims or demands founded upon tort, thus restoring the general meaning assigned to the words "claims or demands," as shown by the authorities cited by Mr. Justice COLE in that case (page 644). According to Lord COKE, as appears in *Vedder v. Vedder*, 1 Denio, 261, the word *demand* "is the largest word in law except *claim;* and a release of demands discharges all sorts of actions, rights, and titles, conditions before or after breach, executions, appeals, rents of all kinds, covenants, annuities, contracts, recognizances, statutes and commons. Bac. Abr. 'Release' (I); Litt. sec. 508; Co. Litt. 291b; *Edward Altham's Case*, 8 Coke, 148a." A similar effect was ascribed in

Sheel v. Appleton, 49 Wis. 126, to a provision that "no action shall be maintained by any person against the city, upon any claim or demand of *any kind whatsoever*, whether arising from contract *or otherwise*." In *Koch v. Ashland*, 83 Wis. 361–363, the provision was: "No suit of *any kind*, or *any claim of any character*, shall be brought against the city, but the claimant shall file his claim with the city clerk," and an appeal was given to the circuit court in case he was aggrieved by its disallowance; and it was held that an independent action upon a claim founded in tort could not be maintained. It will be observed that the statute, as amended, extends to any claim or demand "of *any kind* or of *any character whatsoever*." Before this amendment, a claim or demand founded in tort was not within the statute. The entire purpose of the amendment was to make the statute applicable to claims or demands founded in tort as well as on contract. *Van Frachen v. Ft. Howard*, 88 Wis. 570. The evident policy of the act was to secure to the common council, before litigation should ensue, an opportunity for a full official examination of the merits of an important class of cases, that litigation might be avoided by timely action. To say that such claims are not within the statute as amended is to render the clear and comprehensive language of the amendment void of purpose and without effect. When the plaintiff's claim was disallowed, he had the full statutory period of twenty days within which to appeal, but he failed to avail himself of this privilege. After the expiration of that period, he brought his action, and the defense insisted on by answer was that his action was barred by reason of his failure to appeal, and this was a valid answer in bar. *Watson v. Appleton*, 62 Wis. 267; *Koch v. Ashland*, 83 Wis. 361.

The failure of the court to find on the plea in abatement, effect having been properly given to the same matter in bar, cannot be regarded as an error prejudicial to the plaintiff. A formal finding, sustaining the answer in abatement, would

have served no beneficial purpose when the same matter was an absolute bar upon the merits. The alleged error does not affect the substantial rights of the plaintiff, and furnishes no ground for reversal of the judgment. R. S. sec. 2829.

It follows that the judgment of the circuit court was rightly given for the defendant.

By the Court.—The judgment of the circuit court is affirmed.

RANDLES, Respondent, vs. WAUKESHA COUNTY, Appellant.

June 12 — June 24, 1897.

Counties: Liability for horse taken by sheriff.

A county is not liable for the value of a horse which had been taken from its owner by the sheriff while in pursuit of a felon for whose arrest he had a warrant, and had been overdriven and injured in the pursuit.

APPEAL from a judgment of the circuit court for Waukesha county: WARHAM PARKS, Circuit Judge. *Reversed.*

The undersheriff of *Waukesha* county had a warrant for the arrest of a man who was charged with robbery. The felon fled and the officer pursued. The officer's horse failed. He took the plaintiff's horse, continued the pursuit, and overtook the felon. In the pursuit, the plaintiff's horse was overdriven and injured. The plaintiff brought action against the county for the value of the horse, and recovered judgment. The county appeals.

T. W. Parkinson, for the appellant.

D. J. Hemlock, for the respondent.

NEWMAN, J. This, surely, must be a case of first impression, for no precedent for it is found. It has never been supposed that any duty rested on the county to furnish the

sheriff's officers with horses to ride or drive in the service of process. It has usually been understood that such officers took their offices *cum onere*, and furnished their own conveyance.

The officer, in making this arrest, was not the servant of the county, and the county is not liable for his action. He was engaged in a service due to the general public, and of no particular interest to *Waukesha* county, as a political organization. *Kuehn v. Milwaukee*, 92 Wis. 263, and the cases cited. In such cases the county is not liable for the acts of its officers, unless such liability is put upon it by some statute. No statute declares a liability for such an act as this.

Something is said in the argument about the power of the sheriff to call out the *posse comitatus*. No statute declares the liability of the county to persons called by the sheriff to form the *posse*. But the *posse comitatus* includes only the men of the county. It does not include the horses. The sheriff has no *ex-officio* power to call out the horses.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

CLUNE, Respondent, vs. WRIGHT and another, Appellants.

June 12 — June 24, 1897.

Appeal from justice's court: Sufficiency of notice.

A notice of appeal from a judgment of a justice of the peace which does not specify the amount of damages or costs recovered, or the aggregate amount thereof, or give the date of the judgment other than the year in which it was rendered, is insufficient under sec. 3754, R. S., to confer jurisdiction on the circuit court.

APPEAL from a judgment of the circuit court for Marinette county: S. D. HASTINGS, JR., Circuit Judge. *Reversed.*

Plaintiff appealed to the circuit court for Marinette county from a judgment rendered against him in justice's court October 21, 1895. The judgment was for $36 damages and $52.24 costs. On the 30th day of October, after the rendition of the judgment, plaintiff paid the costs required to perfect an appeal therefrom, and delivered to the justice a proper affidavit, together with a notice, which was in the following language and form:

"State of Wisconsin, } ss.
Marinette County. }

In Justice Court,
"Before W. H. Humphreville,
"Justice of the Peace.

"Daniel Clune, Plaintiff,
vs.
Jason K. Wright and
Anson F. Wright, Defendants. } Notice of Appeal.

To W. H. Humphreville,
"Justice of the Peace.

"TAKE NOTICE, That the above-named plaintiff hereby appeals to the circuit court, of the county of Marinette, from the judgment rendered in this action, before William H. Humphreville, Justice of the Peace, on the —— day of ——, A. D. 1895, in favor of the above-named defendants, *Jason K. Wright* and *Anson F. Wright*, and against the above named plaintiff, for —— dollars, damages, and —— dollars, costs.

"Dated ——, 189–.

"B. F. Simpson, Plaintiff's Attorney."

Objection was taken in the circuit court to the sufficiency of such notice by a motion to dismiss the appeal, which motion was overruled. Such proceedings were thereafter had that judgment was rendered in plaintiff's favor, and defendants appealed.

For the appellants there was a brief by *Quinlan & Daily*, and oral argument by *W. B. Quinlan.*

For the respondent the cause was submitted on the brief of *Wigman & Martin.*

MARSHALL, J. The trial court in due form certified to this court for consideration the single question of whether the notice of appeal was sufficient, under sec. 3754, R. S., to give the circuit court jurisdiction of the cause. The rule is that the notice of appeal, to be effective, must properly designate the judgment appealed from. *Morris v. Brewster*, 60 Wis. 229; *Hills v. Miles*, 13 Wis. 625. That manifestly requires a sufficient description of the judgment in the notice to show the applicability of such notice to such judgment, without resort to extrinsic evidence. The notice in question does not meet that requirement. Neither the amount of the judgment for damages or costs, nor the amount in the aggregate, is given, nor the date of the judgment. This court has often held, where the parties, the court, and the date of the judgment were correctly given, and the only error was an inaccurate description of the judgment in some particular, the description, nevertheless, being sufficient to designate the judgment intended with reasonable certainty, that the notice was sufficient; as in *Friemark v. Rosenkrans*, 81 Wis. 359, where the amount of the costs was not correctly stated, and in *Noall v. Halonen*, 84 Wis. 402, where a judgment for $162.02, damages and costs, was described as for $162.02, damages, and $5.50, costs, and in *Hender v. Ring*, 90 Wis. 358, where, in an action of replevin, the issues were found in favor of plaintiff, the value of the property was found at $45, the damages at six cents, and costs were taxed at $12.31, the notice of appeal gave the amount of the costs and damages correctly, but did not mention the value of the property or the order for its return. Such cases come far short of holding that a notice of appeal which does not give the date

of the judgment, or describe it in any way, other than that it is the judgment rendered in the action in the year 1895, is a sufficient description.

The special question certified for decision must be answered in the negative, and the judgment reversed, and the cause remanded for further proceedings in accordance with this opinion.

By the Court.— So ordered.

MONTAGUE, Respondent, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

June 12 — June 24, 1897.

Fires negligently set: Identification: Striking out conjectural evidence.

1. To warrant a recovery for the destruction of property by a fire alleged to have been negligently set, the fire must be identified and traced as the same continuing fire all the way from the place of its origin to the location of the destroyed property, either by witnesses who saw it or by facts and circumstances equally persuasive.
2. Where a witness, who testified on his examination in chief that he saw a fire in section 9 on the 9th of July, and that it went south and was in section 17 on the 23d of that month, admitted on cross-examination that he did not trace the fire from section 9 to section 17, and was not on section 9 between those dates but was miles away most of the time, his testimony, so far as it tended to show that the fire in section 9 on the 9th crossed to section 17, should have been stricken out on motion as mere assumption and conjecture.

APPEAL from a judgment of the circuit court for Taylor county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action to recover damages for the destruction of a lot of hay and logging tools owned by the plaintiff by means of a forest fire which is alleged to have been negligently set by the defendant's employees upon its right of way.

The plaintiff's logging camp was situated upon the eastern edge of sections 13 and 24, in town 35, range 2 E., in Price county, Wisconsin. The defendant's railroad runs in a general easterly direction through the north part of said town 35, crossing sections 7, 8, and 9, and then, veering off to the northeast, through sections 3 and 2. The fire took place in the month of July, 1894, at a time when the woods were very dry. The plaintiff alleges that on the 7th of July the defendant's section men carelessly and negligently set fire to a lot of old ties upon the right of way of the company at or near the place where the railroad crosses the dividing line between sections 8 and 9, and that said fires were left unattended and uncared for, and that they escaped from the right of way, and burned slowly southward through sections 8 and 9 into sections 17 and 20, and that a part of the fire veered to the eastward, and finally reached the plaintiff's logging camp, and destroyed his property, on the 28th day of July.

The defendant claims, on the other hand, that the fire which started upon its right of way on the 7th of July spread but a little way into sections 8 and 9, and went out, and that the fire which afterwards destroyed the plaintiff's logging camp started early in July, in section 5 of town 34, and burned northward through sections 32, 28, 21, and 22, and thence eastward through sections 23 and 24.

The jury found a verdict for the plaintiff for the value of the hay and tools destroyed, and from judgment thereon the defendant appeals.

For the appellant there were briefs by *Alfred H. Bright* and *Henry B. Dike*, attorneys, and *M. B. Moon*, of counsel, and oral argument by *Mr. Bright*.

D. Lloyd Jones, for the respondent.

WINSLOW, J. There is one crucial and important question presented upon this appeal, and that is whether there was evidence which sufficiently identified the fire which started

on the defendant's right of way July 7th as the same fire which destroyed the plaintiff's logging camp three weeks afterwards. The jury were not at liberty to arrive at the result by guess or probable conjecture, but must have substantive evidence to base their verdict upon.

The plaintiff's camp was about four miles southeast from the place where the fire upon the defendant's right of way started. As appears from the statement of the case, this last-named fire started July 7th, and it was not until three weeks later that the plaintiff's camp was destroyed. Thus it is evident that it was not a sweeping, rapidly advancing fire, which could be easily traced as it swept before the wind, but that it must have been a fire which went slowly, and languished and nearly or quite died out at times. Such a fire must necessarily be carefully traced by the evidence. One witness perhaps may not be able to trace it all of the way, but certainly it must be traced and identified as the same continuing fire, either by witnesses who saw it, or by facts and circumstances equally persuasive, or by both witnesses and circumstances. The evidence all shows that there were many fires burning in the woods in this vicinity at about this time. The country was very dry, and was "full of fire," as some of the witnesses express it. This condition of things renders it all the more necessary that the right-of-way fire of July 7th should be identified and traced by tangible evidence into the sweeping fire of July 28th. Examination of the record shows that there is sufficient evidence tending to show that the right-of-way fire traveled south through parts of sections 8 and 9, and then smouldered; also that a fire was found burning about July 23d in about the center of section 17, which traveled eastward, and may have been the fire which destroyed the plaintiff's camp; but there is a hiatus between these two fires both in time and in space which the evidence does not fill.

This hiatus was attempted to be filled by the witness Mil-

ler, who testified that he saw the right-of-way fire near the line between sections 8 and 9 on the 9th of July, and that that fire went south and was in section 17 on the 23d day of July. Upon cross-examination, however, the witness admitted that he did not trace the fire from section 9 into section 17; that he assumed the fact without tracing; that he was up north of Brantwood most of the time between the 9th and the 21st of July, and was not down in section 9 between those dates, but was miles away. When these admissions were made, the appellant moved to strike out Miller's testimony so far as it undertakes to show that the fire in section 9 on the 9th of July crossed into section 17 on the 21st of July, but the motion was denied, and exception taken. Certainly the motion should have been granted. Miller's admissions on cross-examination demonstrated that his testimony as to the identity of the two fires was mere assumption and conjecture, which ought to have been withdrawn from the jury.

With this evidence out of the case, there is certainly no other evidence in the record which identifies the two fires as the same continuous fire.

By the Court.— Judgment reversed, and action remanded for a new trial.

ST. JOSEPH'S HOSPITAL ASSOCIATION, Respondent, vs. ASHLAND COUNTY and others, Appellants.

June 12 — June 24, 1897.

Taxation: Exemptions: "Benevolent association."

1. Certain of the sisters of a religious order organized a corporation without capital stock for the purpose of conducting and maintaining a hospital for the care of the sick of all classes. The articles of organization provided that no dividends or pecuniary

profits should ever be declared to individual members, and the sisters received no compensation of any kind for their labor. When patients were able to pay, a small charge per week was made, but if they were destitute they were received and treated without pay, if there was room in the hospital. Tickets were also sold entitling the holders to admission at any time within a year. *Held*, that the corporation was a "benevolent association," within the meaning of subd. 3, sec. 1038, R. S., and its property used for hospital purposes was exempt from taxation.

2. The fact that after paying expenses and returning borrowed money there was at times a surplus which was loaned, without interest, to build other hospitals of a similar character, did not show that the property was used for pecuniary profit.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This is an action to set aside taxes levied on the plaintiff's real estate in the city of Ashland, on the ground that it is exempt from taxation, under subd. 3, sec. 1038, R. S.

The facts were that the plaintiff is a corporation formed without capital stock by certain members of a Roman Catholic religious order called the "Handmaids of Jesus Christ." This order is widely distributed, and has hospitals in many cities of the northwest. A number of the sisters formed the corporation in or about 1884, and purchased the real estate in question (which is less than ten acres), and soon afterwards constructed a large hospital thereon, costing over $30,000, the money therefor being partly borrowed from the Provincial Mother House of the order, at Ft. Wayne, Indiana, and partly from parties in Ashland. The articles of incorporation provide that the corporation is formed "for the purpose of conducting and maintaining a hospital for the care, attendance, and medical treatment of the sick and maimed of all classes of persons consigned to its care," and that it is formed without capital stock, and that no dividends or pecuniary profits shall ever be made or declared to the individual members of the society. The sisters receive no compensation of any kind for their labors. They nurse, and

care and provide medical attendance for, the sick who are received, and mend for them, and sometimes give them clothes; and no distinction is made in the reception of patients on account of race, religion, or position in life. When patients are able to pay, they are charged eight dollars per week, or less if they cannot pay that amount, and, if they are not able to pay anything, they are received if there is room in the hospital, and treated without pay. Tickets are sold at seven dollars each which entitle the holder to admission at any time within one year. A ticket holder, if taken sick, can stay at the hospital until he is well, and he will pay or not, according to his ability. There are no means of getting money except by the sale of tickets and by the charges for care. All the money realized over and above the actual expenses of the institution is used to pay their debts for borrowed money, or it is loaned to other hospitals owned by the order in other northwestern cities, without interest. In case one of their ticket holders is taken sick in another city where the order conducts a hospital, he can enter such hospital, and be treated, and the plaintiff corporation pays for such treatment. It appeared that during a number of years the hospital receipts had been larger than its expenses, and the surplus had been partly used in paying its building expenses, and partly in advancing money, without interest, to aid in the erection of hospitals belonging to the order at Superior and West Superior.

Under these circumstances, the circuit court adjudged that the plaintiff's lands were exempt from taxation, and the defendants appealed.

For the appellants the cause was submitted on the brief of *George H. McCloud.* He contended, *inter alia*, that to render an institution charitable so as to exempt it from taxation, all the proceeds must be used in conducting the one institution claimed to be exempt. That the income, over and above that necessary to carry on the institution, is used to help

other charities, or for charitable work elsewhere, is not sufficient. 25 Am. & Eng. Ency. of Law, 167; *Chapel of Good Shepherd v. Boston*, 120 Mass. 212; *Indianapolis v. Grand Master*, 25 Ind. 518; *American Asylum v. Phœnix Bank*, 4 Conn. 172; *Cleveland Library Asso. v. Pelton*, 36 Ohio St. 253; *Appeal of Philadelphia*, 15 Atl. Rep. 683. The words charitable and benevolent, when used together in statutes such as ours, are synonymous. *Bangor v. Rising Virtue Lodge*, 73 Me. 428–433; *Saltonstall v. Sanders*, 11 Allen, 470. The distinctive characteristics of a public charity are (1) that its funds are derived from gifts and devises, and not from fees, dues, and assessments; (2) that it is not confined to privileged individuals, but is open to the indefinite public. *Bangor v. Rising Virtue Lodge*, 73 Me. 428; *Att'y Gen. v. Proprietors of Federal Street Meeting House*, 3 Gray, 1, 50; *Northampton Co. v. Lafayette College*, 128 Pa. St. 132; *Theil College v. Mercer Co.* 101 id. 530; *Fire Ins. Patrol v. Boyd*, 15 Atl. Rep. 553.

For the respondent there was a brief by *Tomkins & Merrill*, and oral argument by *W. M. Tomkins*.

WINSLOW, J. Under subd. 3, sec. 1038, R. S., the personal property of any "religious, scientific, literary, or *benevolent* association, used exclusively for the purposes of such association, *and the real property*, if not leased or not otherwise used for pecuniary profit, necessary for the location and convenience of the buildings of such association and embracing the same, not exceeding ten acres," are exempt from taxation. The grounds upon which the plaintiff's hospital are situated are less than ten acres in extent, and they are not leased, and the sole questions are whether the hospital association is a *benevolent* association, within the meaning of the law, and whether the evidence shows any use of the building for pecuniary profit.

The word "benevolent" means, literally, "well-wishing." It is a word of larger meaning than "charitable." It has

been well said that, "though many charitable institutions are very properly called benevolent, it is impossible to say that every object of a man's benevolence is also an object of his charity." *James v. Allen*, 3 Mer. 17; *Thomson's Ex'rs v. Norris*, 20 N. J. Eq. 489. How it can be doubted that this institution is doing a benevolent work in the truest sense of the word we are unable to see. It is really the work of the good Samaritan. It is true that those who are able to pay do pay a very moderate weekly charge, but those who are unable to pay receive the same care for nothing. This does not render the work done any the less benevolent. Doubtless, if the hospital were absolutely free to all, it could not be operated. It is the very fact that pay is collected from those who can pay which enables the sisters to operate the hospital and care for those who are too poor to pay. If this work be not benevolent work, especially in the great cities and in the newly-settled districts, then there will have to be a new meaning attached to the word "benevolent." It is impossible to know how many men without home and friends owe their very lives to the care received in this and similar hospitals, when no other place opened its doors to them. We entertain no doubt that the work of this association is a benevolent work. The care of the sick and wounded of all races and religions indiscriminately, with or without pay, according to the ability of the patient, must ever be one of the most genuine forms of benevolence. It breathes the truest love for unfortunate mankind. *Philadelphia v. Women's Christian Asso.* 125 Pa. St. 572; *Hennepin Co. v. Brotherhood of Church of Gethsemane*, 27 Minn. 460.

The fact that there were surplus receipts at times, which were loaned to build other hospitals of the same character, does not show that the property was used for pecuniary profit. This is so evident that further discussion seems unnecessary.

By the Court.—Judgment affirmed.

BERGERON, Respondent, vs. HOBBS and others, Appellants.

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June 12—June 24, 1897.

Corporation de facto: *County agricultural society: Filing certificate, etc.: Condition precedent.*

1. The mere recording of the certificate of organization, etc., of a county agricultural society in the office of the register of deeds, without intention to leave the papers with him and they being in fact withdrawn after being recorded, is not a "filing" thereof within the meaning of sec. 1460, R. S., providing that upon the filing of such papers in said office such society shall have all the powers of a corporation, etc.
2. The filing of said papers is a condition precedent to the vesting of corporate powers; and until the provision is complied with the organizers of the society are not acting as a corporation under color of right, so as to relieve them from individual liability for the debts of the society, even though they carried on business under supposed authority to act as a body corporate in entire good faith. MARSHALL, J., dissents, being of the opinion that by the attempt to comply with the law authorizing the formation of the corporation, and the transaction of business in good faith as such, the society became a corporation *de facto*, whose existence could not be questioned collaterally by those who had dealt with it as a corporation.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The defendants, under the name of Bayfield Agricultural Association, employed several persons to perform labor in improving their grounds and in erecting fences and buildings. Time checks given by the defendants to such laborers, for such labor, were assigned to the plaintiff, who brings this action to recover their amount, alleging that the defendants were a copartnership. The defendants alleged that they were members of a corporation, and denied that they were copartners, or liable as such. This was the issue which was tried. It appeared upon the trial that articles of organization of the defendants as the Bayfield County Agri-

cultural Association, and a certificate showing the election of officers, had been recorded in the office of the register of deeds of Bayfield county, but were not on file there. They had been deposited with instruction to record and return them, which had been complied with. When the testimony of both sides was in, the court directed a verdict for the plaintiff for the amount of the time checks. From a judgment on that verdict the defendants appeal.

For the appellants the cause was submitted on the brief of *George P. Rossman.*

For the respondent there was a brief by *W. H. Packard* and *A. W. McLeod*, and oral argument by *Mr. McLeod.* They argued, among other things, that whenever the statute requires the filing of the articles of association the filing of the original certificate with the clerk is an indispensable prerequisite to the creation of the corporation. Until this has been done the corporation has no existence, and failure in that regard may be shown incidentally and taken advantage of collaterally, whenever the fact of incorporation is in any form called into question. *Childs v. Hurd*, 32 W. Va. 66; *Mokelumne Hill C. & M. Co. v. Woodbury*, 14 Cal. 425; *Abbott v. Omaha S. & R. Co.* 4 Neb. 416; *McIntire v. McLain Ditching Asso.* 40 Ind. 104; *Att'y Gen. v. Hanchett*, 42 Mich. 436; Thomp. Corp. § 226. Filing the articles of association with the register of deeds is a condition precedent. *Abbott v. Omaha S. & R. Co.* 4 Neb. 416; *Martin v. Deetz*, 102 Cal. 55; Thomp. Corp. § 227; *Spencer, Field & Co. v. Cooks*, 16 La. Ann. 152; *Bigelow v. Gregory*, 73 Ill. 197.

NEWMAN, J. There are two questions raised on this appeal: (1) Was the mere recording of the articles of incorporation, with the certificate of the election of officers, without the intention or fact of the papers themselves remaining in the office, a sufficient compliance with the statute, so that the organization of the corporation became complete, as upon a

proper filing of the papers themselves? And (2) if the recording was not sufficient for that purpose, are the defendants liable to the plaintiff only as a *de facto* corporation, or are they liable as copartners?

1. The statute (sec. 1460, R. S.) provides that, upon the filing of "a certificate of organization, . . . with a copy of the constitution," in the office of the register of deeds of the county, "such society shall have all the powers of a corporation necessary to promote the objects thereof." It cannot be doubted that the filing of the proper papers in the proper office is made, by the statute, a condition precedent to the vesting of corporate powers. The court may not be able to clearly define the respect wherein the mere recording and removal of the papers from the office fails to serve the full purpose which the legislature intended to accomplish by the filing of them. The legislature, no doubt, had good and sufficient reasons for its choice of means to promote its purpose. For the court it is not a question of equivalents. A literal filing of the papers is necessary because it is so written in the law. The term "filing" and the verb "to file," as related to this subject, include the idea that the paper is to remain in its proper order on file in the office. A paper is said to be filed when it is delivered to the proper officer, and by him received, to be kept on file. Bouv. Law Dict. The statute is plain and easy of observance. Valuable rights and exemption from personal liability are to be secured by its observance. It is no undue severity to require its strict observance. The defendants had not observed it, and had not secured corporate powers.

2. Had the defendants secured immunity from individual liability? No doubt, as a general rule, where an attempt to organize a corporation fails by omission of some substantial step or proceeding required by the statute, its members or stockholders are liable as partners for its acts and contracts. Beach, Priv. Corp. §§ 16, 162; 1 Thomp. Corp. §§ 239, 416,

417. But the defendants' contention is that they are not within this rule, because they are at least *de facto* a corporation, and their right to be a corporation cannot be inquired into in a collateral action, but only in a direct action for that purpose by the state. The infirmity of the defendants' contention is in the assumption that they are *de facto* a corporation. In order to secure this immunity from inquiry into its right to be a corporation in a collateral action, its action, as a corporation, must be under a *color*, at least, of right. It is immaterial that they have carried on business under the supposed authority to act as a body corporate, in entire good faith. If they had not *color* of legal right, they have obtained no immunity from individual liability for the debts of the supposed corporation. Until the articles of incorporation are filed in the office of the register of deeds of the county, there is no color of legal right to act as a corporation. The filing of such paper is a condition precedent to the right to so act. So long as an act, required as a condition precedent, remains undone, no immunity from individual liability is secured. 1 Thomp. Corp. §§ 226, 508.

The defendants are not a corporation either *de jure* or *de facto*, but are liable for the plaintiff's claim as partners. It was not necessary to prove a copartnership by evidence. That was established by implication of law. Nor was it necessary to prove that the debt was unpaid. There was no presumption that it had been paid to be rebutted. The judgment of the circuit court is right, and must be affirmed.

By the Court.— The judgment of the circuit court is affirmed.

MARSHALL, J. With the decision that the defendants failed to comply with all the conditions precedent to the corporate existence of the agricultural association I concur, but from the decision that because of such failure such association was not a corporation *de facto* I respectfully dissent; hence dis-

sent from the conclusion reached that the defendants are personally liable to plaintiff, and that the judgment should be affirmed, but, on the contrary, hold that it should be reversed.

My brethren cite Beach, Priv. Corp. § 162, and 1 Thomp. Corp. §§ 239, 508, to the effect that, unless all the conditions precedent to the creation of a corporation are performed, there can be no corporation in fact, and that the members of the pretended corporation will be personally liable. Then §§ 417 and 420 of Judge Thompson's work are cited, to the effect that, if the corporation never comes into being in fact, so as to be regarded as a corporation *de facto*, the persons who have assumed to contract in its name are personally liable. These sections seem to be tied together, in the opinion of the court, as if the two ideas are in harmony, when the contrary, to my mind, is manifestly true. Thompson treats this subject in such a way as to naturally confuse one who attempts to follow him as authority. After saying, in §§ 239, 508, in effect, that all the conditions precedent to the creation of a corporation must be complied with, in order that the members may escape personal liability, he says, in § 417, that the rule does not apply to corporations *de facto*, and in § 420 that where there is a corporation *de facto*,—in other words, where the circumstances are such that a corporation might exist, and where the party seeking to charge the members individually has dealt with them as a corporation,—he is estopped from setting up the fact that they are not a corporation *de jure*, in order to charge them personally. From this confusion it is not to be wondered at that if a person tries to follow Judge Thompson he will be led inevitably into the position of holding that, *unless all the conditions precedent to the existence of a corporation are complied with, personal liability of the members of the corporation will exist, though the rule does not apply if the organization be a corporation* de facto. That comes from trying to

harmonize conflicting decisions, that proceed on theories so opposite that harmony is impossible.

If we hold with Missouri, Arkansas, and some other states, that unless all the steps necessary to the creation of the corporation have been taken there is no corporate existence, and that the members of the association are personally liable, we, in effect, say that it is not sufficient to enable such members to escape personal liability to show that their organization is a corporation *de facto;* that nothing short of a corporation *de jure* will do. But if we adopt the growing doctrine, supported, as I shall show, by the overwhelming weight of authority in this country, that if a person contracts with a *de facto* corporation, the members of the latter and such person believing, in good faith, in its legal existence, such members cannot be held personally liable, then we concede, necessarily, that it is not essential to freedom from such liability that all the statutory requisites to the existence of a corporation be complied with, because, when that is done, the organization, obviously, is not a corporation *de facto* only; it is a corporation *de jure.* This is too plain to admit of serious discussion.

While the decision in this case, as I read the opinion of the court, in one view, goes upon the ground that the members of a *de facto* corporation are not responsible personally, inasmuch as it may be held that the decision really is to the effect that personal liability exists because all the conditions precedent to a corporation *de jure* were not complied with, some reference to authorities on the subject of whether to escape such liability it is necessary that the corporation exist in fact may be proper.

The development of the law on this subject has been rapid in recent years in the direction of holding that the state only can challenge the legality of the exercise of corporate powers. The ancient doctrine was that all contracts made by a corporation in excess of its powers were void. That has not

been changed, but the doctrine has grown up and become well-nigh universal, that the state only can raise the question by proceedings to punish the corporation. Our court is fully committed to such doctrine. *John V. Farwell Co. v. Wolf*, *ante*, p. 10. Following closely upon the growth of such doctrine, as applied to transactions in excess of corporate powers, where there is no question as to the existence of the corporation, it has been extended, so as to prevent private persons, who have contracted with a *de facto* corporation, from questioning its existence; holding that sovereign power only can raise that question. This court having fully adopted the doctrine where there is a corporation in fact, how it can be rejected where the corporation is *de facto* merely is not perceived, inasmuch as a controlling reason for it in the one case applies equally to the other. In both cases there is an exercise of powers that can only be lawfully exercised by sovereign authority; hence the unauthorized exercise of power constitutes a public offense, not against any individual, but against the sovereignty of the state. A few authorities of the multitude that exist on the question under discussion will be referred to.

In *Cochran v. Arnold*, 58 Pa. St. 399, the question was whether a person who had contracted with a pretended corporation, so defectively formed that in a suit by the commonwealth it would have been enjoined for want of legal existence, could, in an action against the members of such corporation to enforce personal liability, successfully question the corporate existence. The case is particularly in point here, because the corporation claimed to exist by compliance with a general law, and the point was made that the rule that a private person cannot question the existence of a corporation assuming to exist under the special law does not apply fully to corporations organized under general laws. To that and the general subject Mr. Justice STRONG said: "Though formed under a general law, it is, as against all the world but the

commonwealth, as completely and effectually a corporate body as if it had been created by a special act of assembly and by letters patent. . . . Until the franchise claimed and used has been directly adjudged not to exist, there is a corporation *de facto*, at least. If there is anything settled, it is that the corporate existence of a corporation *de facto* cannot be inquired into collaterally. Upon this subject the authorities are too numerous to admit of citations." The learned judge then proceeds to show that the doctrine announced was contrary to earlier decisions of the court, but that happily, before any great mischiefs had been caused by the error in such earlier decisions, the opportunity was presented for correcting it and placing the court in line with the great weight of authority on the subject. Considering the consequences of a contrary view, he said, in effect: 'The mischiefs of such a doctrine would be the same, whatever the mode of obtaining corporate existence. One jury might say there was no corporation; another jury find to the contrary. One creditor might sue the corporation as a valid organization; another sue the members, alleging that the charter is null and furnishes no immunity from personal liability. New stockholders might come in, wholly ignorant of the secret vice in obtaining the corporate thing, and be held liable. The charter would have to be effective upon the one hand and ineffective upon the other. What confusion would such a monstrous doctrine produce!' This language fairly expresses the idea of the court, and is not too strong to fit the case; and the ruling has been followed down to the present time by such court. In *Hamilton v. C., M. & P. R. Co.* 144 Pa. St. 34, there was an attempt to set up want of legal incorporation, and Justice PAXTON said, in effect, the corporation at least had a *de facto* existence; therefore, it could contract debts, and, if there is anything settled in the law, it is that the existence of a corporation *de facto* cannot be inquired into collaterally. See, also, *Spahr v.*

Farmers' Bank, 94 Pa. St. 429; also, *Guckert v. Hacke*, 159 Pa. St. 303, where the court held that though, if plaintiff had dealt with defendants as a corporation he would have been estopped from claiming against them in any other capacity, he was not in that case, because he did not know that they pretended to be a corporation; therefore, did not deal with them as such.

The same subject was treated by the supreme court of Georgia in *Planters' & M. Bank v. Padgett*, 69 Ga. 159, where the rule was laid down, in effect, that having contracted with the company, through its officers or agents, both parties believing the corporation to exist *de jure* as well as *de facto*, an action cannot be maintained against them personally on the contract. The members never agreed to enter into the contract severally or jointly; they never agreed to be bound as partners, or to hold themselves out as such. The contract was intended to bind the association in a corporate capacity only.

In *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep. 197, the corporation was so defectively organized as to have no legal existence. An action was brought by one who had dealt with it, against the stockholders, to hold them personally liable. Judge BREWER, in delivering the opinion of the court, said, substantially, if the corporation had been challenged by the state, its exercise of corporate powers would have been enjoined, but where persons act in good faith, and suppose they are members of a valid corporation and transact business as such, and the corporate existence is not challenged by the state, they cannot be held liable as individuals; that if a person deals with a supposed corporation,— with what all persons suppose is a corporation,— he cannot afterwards turn around and say, "Well, I dealt with this supposed corporation; I thought it was a corporation; I trusted it as such; but, by reason of failure to legally incorporate, there is no legal corporation; therefore, I will hold the stockhold-

ers personally liable." I do not think that can be done. To the same effect are *Stafford Nat. Bank v. Palmer*, 47 Conn. 443; *Eaton v. Walker*, 76 Mich. 579; *Merchants' & M. Bank v. Stone*, 38 Mich. 779; *Haas v. Bank of Commerce*, 41 Neb. 757; 17 Am. & Eng. Ency. of Law, 866, and numerous cases there cited; 4 Thomp. Corp. § 5275; Morawetz, Priv. Corp. (1st ed.), §§ 141, 142; Angell & A. Corp. § 635. In Cook, Stock, § 637, the rule is laid down and supported by many authorities, to the effect that, with few exceptions not including the case under consideration, no one is allowed to assert that the corporation was illegally incorporated until that result has been decreed by a court in a proceeding instituted for that purpose by the state; that where persons do business in good faith as a corporation, without having any legal existence as such, it is called a *de facto* corporation, and only the state is allowed to question its existence. So, a party contracting with such a corporation cannot defeat his obligation by saying that the corporation was never legally incorporated.

The foregoing citation of authorities has been carried to great length, but warranted, in my judgment, from the importance of the question involved. After carefully examining such authorities and the reasoning on which the doctrine discussed is based, I am unable to understand how any other conclusion can be reached than that a decision cannot be made that plaintiff in this case can attack the existence of the agricultural association as a corporation, if it were such *de facto*, without holding in direct conflict with the decision in *John V. Farwell Co. v. Wolf*, *ante*, p. 10, which is supported by the highest authorities in this country, and which the court certainly would not wish to question. True, there are some authorities still holding to the ancient doctrine that any one can challenge the existence of a corporation or the legality of its acts, but the trend of modern authority is to fence in, within constantly narrowing limits, the cases

where private persons can attack either the existence of a corporation or the legality of its exercise of powers; and in the humble opinion of the writer, the theory that a private person can so attack a corporation will disappear altogether in the near future, either by the courts that adhere to the ancient doctrine voluntarily changing their rule on the subject, or by its being changed by statute.

Illinois has adhered as rigidly as any state to the doctrine that a creditor may raise the question of want of legal incorporation, yet, in the recent case of *Winget v. Quincy B. & H. Asso.* 128 Ill. 67, it was held that, if a person contracts with a corporation *de facto* and receives the benefit of such contract, he cannot be permitted to allege any defect in the organization of the corporation as affecting its capacity to make the contract, even if the law under which it was organized was unconstitutional; that objection to the corporate existence is available only on behalf of the sovereign power of the state. That is carrying the doctrine under discussion further than is necessary for the purposes of this case, and beyond the general rule that there cannot be a *de facto* corporation under an unconstitutional law, because it is absolutely necessary to the existence of a *de facto* corporation that there be a valid law under which it might exist *de jure.*

So we say the law is that he who deals with a *de facto* corporation cannot attack its legal existence, though in administering it courts do not agree as to all the reasons for the doctrine. By some it rests on the ground that courts can only enforce contracts actually made by parties — cannot make contracts for them; by others upon the ground of estoppel; by others upon the broad, universally established principle that only the state can question the existence of a corporate organization, or the legality of its exercise of powers; and by still others upon the ground that broad principles of justice and public policy require that persons who, in

good faith, assume to exercise corporate powers and have a *de facto* right so to do, should not be compelled, in all their business transactions, in all courts and places, to be ready to successfully meet attacks upon their right in this regard; that so long as the law exists under which they might legally do the very thing they assume to do, and the failure to comply with the law is a mere usurpation of power, which only concerns the community in its sovereign capacity without prejudice to the individual members of the state, justice and the certainty of contracts, upon which prosperous business in the complicated, practical affairs of life depend, require that such persons as against all but the state shall be regarded as that which they assume to be, and might in fact be, except for some act on their part not attributable to bad faith. In our judgment, all of the reasons strongly support the doctrine, and either is sufficient, particularly the one sanctioned by this court in *John V. Farwell Co. v. Wolf*, *ante*, p. 10, that only the state can question the legality of corporate existence when there is a colorable right to so exist.

It only remains to be considered whether the association in question was a *de facto* corporation. My brethren say no, and, as I understand it, because there was a failure to perform some condition precedent to its being a corporation *de jure*. I must assume that such is really not the doctrine of this court, for the essential element of a mere corporation *de facto* is failure to comply with some provision of law requisite to its legal existence. Where such conditions are all complied with, then the corporation becomes an organization *de jure*, as well as *de facto*, and the doctrine pertaining to the latter class of official bodies has no application whatever. If it were the law that a corporation must be such *de jure* in order to be such *de facto*, obviously, the doctrine pertaining to the latter, upon which much learning has been displayed by the courts and text writers, would stand as the result of much useless expenditure of mental energy. The

true doctrine is that it is sufficient to constitute a corporation *de facto*, as against one who has recognized its corporate existence, that there be a law under which it might exist *de jure*, an attempt in good faith to organize under such law, and a subsequent user of the assumed corporate powers. This is not an open question in this state. In *Evenson v. Ellingson*, 67 Wis. 634, the question was considered, and in an opinion by Mr. Justice ORTON the rule was laid down, in effect, as above stated, and the case has been since approvingly cited by standard text writers and by many of the highest courts of the country as a correct exposition of the law. I might rest this opinion on the subject of whether the association in question was a *de facto* corporation, upon the principle there laid down, but, inasmuch as the subject is one of considerable importance, and one which the court will be liable to consider on some future occasion, some general treatment of the subject is necessary to meet the purposes of this opinion. The transaction of business by corporate bodies has become so very general, and the system is growing so rapidly, that just what is necessary in order that persons assuming to exercise corporate powers may safely consider themselves a corporation *de facto* is of the highest importance to the safe conduct of the multitude of business operations conducted by such bodies, and to an understanding by such persons of their legal liability.

One of the earliest and best considered cases on this subject is *Methodist E. U. Church v. Pickett*, 19 N. Y. 482. The corporation claimed to exist under a general law. Such law required the making, acknowledging, and recording of a certificate of organization, showing certain facts. That was complied with, except that the certificate did not show the existence of all facts requisite to a legal corporation. After acting as a corporation for some time, in an action brought as such to which a private person was a party, its corporate existence was challenged. On the question thus presented,

Mr. Justice SELDEN, speaking for the court, said: "It has been repeatedly held that, as against all persons who have entered into contracts with bodies assuming to act in a corporate capacity, it is sufficient for such bodies to show themselves to be corporations *de facto*, and to that end two things are necessary: (1) The existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user by the party to the suit of the rights claimed to be conferred by such charter or law. The rule established by law, as well as by reason, is that parties recognizing the existence of corporations, by dealing with them, have no right to object to any irregularity in their organization. As long as it is overlooked or tolerated by the state, it is not for individuals to call it in question." And further, in effect, that if the law exists, and the record exhibits a *bona fide* attempt to organize under it, or there is even a slight evidence of user, that is all that is required to establish the corporation *de facto;* and evidence, in a contest between it and one who has dealt with it as a corporation, of defects in its organization, short of such as would show a want of good faith on the part of those concerned in the proceedings, would be wholly immaterial. Judge SELDEN refers to numerous earlier decisions in New York on the subject, particularly to *U. S. Bank v. Stearns*, 15 Wend. 314, *Trustees of Vernon Soc. v. Hills*, 6 Cow. 23, and *Brouwer v. Appleby*, 1 Sandf. 158, where OAKLEY, C. J., discussing the same subject, said: "The defendant, as a contracting party with this corporation, cannot object to the want of the requisite organization, and any defect in that respect, if valid, is only available in behalf of the sovereign power of the state."

Vanneman v. Young, 52 N. J. Law, 403, touches the instant case at every point. The condition precedent which defendants here failed to perform was that as to filing in the office of the register of deeds of their constitution and certificate

of organization. They recorded their articles of organization, which were adopted, in form, under the general incorporating act, not that relating specially to agricultural societies; so that the record, speaking with reference to the papers required to be on file with the register of deeds, was not merely defective; it did not exist at all. Now it may be contended that, while such official record need not show that all the steps requisite to the organization of the corporation were taken, in order to give it colorable existence, an official record of some sort, showing an attempt to comply with the law, is necessary. In *Methodist E. U. Church v. Pickett, supra*, the following language is used: "If the law exists, and the *record exhibits* a *bona fide* attempt to organize under it," that is sufficient. This may be deemed to signify that the *record* referred to must be an *official record*,— the record which the law requires shall be made. The same language is used in Angell & A. Corp. § 635, but a careful examination of the authorities will clearly show that the *record* intended is not the record of the corporation papers required by law. The word "record" refers solely to the acts shown by the evidence to have been actually done by the persons assuming to act as a corporation, by way of complying with the law authorizing its organization. Such facts constitute the record, in a legal sense, of their doings, and *by such record* it must appear that they, in good faith, intended to acquire corporate power.

In *Vanneman v. Young, supra*, there was, as here, an absolute failure to comply with the law in respect to the official record. The certificate of incorporation was not filed in the office of the secretary of state. That, under the New Jersey law, was essential to corporate existence. Plaintiff sold to the pretended corporation some merchandise, and, upon payment therefor not being made, suit was brought by him against the members of the corporation, to charge them personally as partners, upon the ground that the corporation

had no legal existence. In deciding the question thus presented, Mr. Justice DIXON said, in effect: 'The statute authorized the incorporation of the associates. They attempted to organize under its provisions. The contract was entered into by plaintiff on the assumption that he was dealing with a corporation *de jure*. The failure of the associates to comply with the statute did not, in the least, impair the rights which the plaintiff intended to secure by his contract. Under these circumstances, the plaintiff cannot bring into question the legality of the corporation. Where the law authorizes a corporation, and there is an effort in good faith to organize under the law, and, as a result of such effort, corporate functions are assumed and exercised, the organization becomes a corporation *de facto*, . . . and its existence can only be inquired into in a direct proceeding brought in the name of the state. No private person having dealings with a *de facto* corporation can be permitted to say that it is not a corporation *de jure*.'

In *Georgia S. & F. R. Co. v. Mercantile T. & D. Co.* 94 Ga. 309, there was a general law under which the organization might have been incorporated. It organized under a special law that was held unconstitutional. There was an entire absence, it will be observed, of any *official record* of any act done under the general law. It was held that the special law was unconstitutional and void; hence that the organization had no *de jure* existence; nevertheless, that it was a corporation *de facto;* that the essentials of a *de facto* corporation were all present: (1) A law under which the organization might have been incorporated; (2) a *bona fide* attempt to become incorporated; and (3) an assumption and exercise of the powers of a corporation, unchallenged by the state.

The foregoing authorities are believed to fairly state the law in respect to what is necessary to constitute a corporation *de facto*. The very meaning of the term "*de facto*" in-

dicates that nothing more is necessary to the existence of a *de facto* corporation than the exercise of corporate powers in good faith. *Corporation* de facto,—*that is, a corporation from the fact that it is acting as such under color of right in good faith.* The existence of the law, and some attempt to comply with it, are essential, because without them there can be no assumption of the right to corporate existence in good faith. Persons cannot be said to honestly claim the right to corporate existence, in the absence of any law authorizing the organization, or in the absence of some honest attempt to comply with such law, if one exists. The law and such attempt, or user of the franchise, whatever mistakes may be made in so doing,—such as the filing of articles of organization when they are required to be recorded, or the recording of articles when they are required to be filed, or the filing of such articles in the wrong office, or any other of the numerous mistakes that might be made,—make a corporation good everywhere, in all courts and places, till successfully challenged by the state. There is hardly any end of authority, all in harmony on this subject, but we content ourselves by referring to the following additional cases: *Haas v. Bank of Commerce*, 41 Neb. 754; *East Norway Lake N. E. L. Church v. Froislie*, 37 Minn. 447; *Snider's Sons' Co. v. Troy*, 91 Ala. 224; *Stout v. Zulick*, 48 N. J. Law, 601; *McCarthy v. Lavasche*, 89 Ill. 270; *Hudson v. Green Hill Seminary Corp.* 113 Ill. 618; *St. Louis v. Shields*, 62 Mo. 247; *Central A. & M. Asso. v. Alabama G. L. Ins. Co.* 70 Ala. 120; *Palmer v. Lawrence*, 3 Sandf. 161; *North v. State ex rel. Pate*, 107 Ind. 356.

From the foregoing, I am warranted in asserting that, by well-settled principles of law, the agricultural association with whom plaintiff contracted was a *de facto* corporation. Every element necessary to make it such appears clearly by the record. There was a law under which it might have existed. The association prepared their constitution, and

adopted it in the form of ordinary articles of organization, under the general incorporating act, and by mistake they filed it for record, and it was recorded and returned, instead of filing it to be left in the office, as the law requires. They supposed that they had corporate existence by reason of the recording of their articles of organization. They assumed to act as a corporation, and exercised corporate powers for a considerable length of time, and, for aught that appears, in the utmost good faith. Certainly, the existence of the law, the making and recording of articles of organization in an honest attempt to become a corporation, and the honest assumption and exercise of corporate powers, *primâ facie*, establishes good faith. Plaintiff supposed that the corporation was a corporate body till long after his contract relations with the association ceased. Now to allow him to come in and say that the corporation did not exist which all supposed had legal existence; that, though the officers of the association and plaintiff contracted for a corporate liability on the part of the former, it shall be held, nevertheless, that the members of such association are bound as partners, in direct violation of the well-settled law that such an association, under the circumstances, was a *de facto* corporate body; and that, as between the parties, the relations are the same in all respects as though the corporation had a *de jure* existence, and contrary to the settled doctrine, as I believe, of this and most other courts,— is what the judgment in this case does, in my opinion.

I think the judgment of the circuit court, holding the defendants liable as partners, was wrong, and that it should be reversed, and the cause remanded for a new trial.

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KENDALL, Respondent, vs. HYNES LUMBER COMPANY and others, Appellants.

June 12 — June 24, 1897.

Liens: Logs and lumber: Improvements to sawmill: Time of filing.

1. Under sec. 3329, S. & B. Ann. Stats. (providing that a person who performs labor in cutting, felling, hauling, or running logs, or manufacturing them into lumber, etc., shall have a lien upon the logs and the lumber manufactured therefrom), no lien is created upon lumber for work done in driving piles and building docks and tramways for permanent use in connection with the sawmill where it was manufactured.
2. Under sec. 3331, S. & B. Ann. Stats. (providing that for work done upon logs, etc., between November 1 and May 1 following, the claim for a lien shall be filed on or before June 1 following, and that for work done after May 1 and before November 1, following, or for continuous work from November 1, or a day prior thereto, to and beyond May 1 following, the claim for a lien shall be filed within thirty days after the last day of doing such work) in order to sustain a lien for work done prior to May 1 in any year where the claim was not filed till after June 1 following, it is essential to show that the work commenced on November 1 preceding, or a day prior thereto, and continued without material interruption to within thirty days of the time of such filing.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Pursuant to a petition duly filed,— not containing any allegation, however, of continuous work,— plaintiff brought this action under the statutes of this state, for the enforcement of a lien for labor on logs and in manufacturing such logs into lumber. The period covered by the petition for the lien and the complaint was from the 1st day of October, 1894, to the 21st day of September, 1895. The complaint did not contain any allegations that the work was continuous. It properly described the logs and the lumber manufactured therefrom, on which the lien was claimed, and, except

as aforesaid, contained all the requisite allegations to entitle plaintiff to a lien for the entire work done between the dates named. The action was brought against the *Hynes Lumber Company*, the employer. *S. K. Martin Lumber Company*, *Twohey Mercantile Company*, and *F. A. Hamilton*, to whom the lumber had been sold, were made defendants on their application therefor, under the statute authorizing the same. The *Hynes Lumber Company* answered separately, and the other defendants jointly, putting in issue the right of plaintiff to a lien judgment.

The evidence showed that plaintiff commenced work in the logging operations in the woods about October 21, 1894; that his first work was in making a necessary logging road; that he then worked in setting up a portable engine for use in hauling the logs up a hill; that he worked thereafter till the 20th day of March, 1895, in operating such engine, hauling the logs in question, and other logs owned by one Cochrane; that he left the logging operations on the 20th day of March mentioned, and thereafter worked up to the 21st day of September, 1895, mainly in driving piles, making docks, and building tramways, which were permanent structures for use in connection with a sawmill plant located on the banks of Lake Superior, owned or operated by the *Hynes Lumber Company*, to which the logs in question were driven, and where the greater part thereof were manufactured into lumber, and the lumber piled on the mill premises and marked to the purchasers thereof, prior to the 21st day of September, 1895. Aside from the work of making permanent improvements as stated, plaintiff worked some, subsequent to the 20th day of March, 1895, making booms and in helping to operate the sawmill. The amount of time he was engaged in each of the various kinds of work mentioned, or in making permanent improvements to the sawmill property, does not appear.

The jury, under instructions from the court, found that

there was due plaintiff for all his work done between the 21st day of October, 1894, and the 21st day of September, 1895, $509; that it was all lienable work done on the logs and lumber in question; and that plaintiff was entitled to such lien. There was a motion to set the verdict aside and for a new trial, which was denied. Judgment was rendered in plaintiff's favor in accordance with the verdict, and defendants appealed.

For the appellants there was a brief by *Tomkins & Merrill*, and oral argument by *W. M. Tomkins*.

For the respondent there was a brief by *Cate, Sanborn, Lamoreux & Park*, attorneys, and *D. F. O'Keefe*, of counsel, and oral argument by *Mr. O'Keefe*.

MARSHALL, J. The sole question which requires consideration in this case is, Does the evidence support the verdict? It is undisputed that a large part of the work done after March 20, 1895, was in driving piles and in building docks and tramways for permanent use in connection with the sawmill. True, such structures were necessary to the business of manufacturing logs into lumber, but only in the sense that the sawmill was necessary; and it could not be seriously contended that work done in constructing the mill would constitute a lien upon the logs to be manufactured therein, or the lumber there manufactured from such logs. Sec. 3329, S. & B. Ann. Stats., provides that "any person who shall do or perform any labor or services in cutting, felling, hauling, running," etc., "or manufacturing into lumber, any logs," etc., shall have a lien upon such logs and lumber. It is a remedial statute, and, in the interest of labor, the rules of liberal construction should be applied in determining its scope and meaning, as has frequently been decided by this court. *Jacubeck v. Hewitt*, 61 Wis. 96; *Kollock v. Parcher*, 52 Wis. 393; *Hogan v. Cushing*, 49 Wis. 169; *Winslow v. Urquhart*, 39 Wis. 260. But, without doing violence to the

language of the statute, we cannot so construe it as to include work done in the original construction of any part of a sawmill plant to be used in manufacturing logs into lumber and caring for the manufactured product till moved off from the mill premises. In *Glover v. Hynes L. Co.* 94 Wis. 457, we held that work done in making permanent improvements to a sawmill is not within the statute. The same rule applies to permanent improvements and necessary appurtenances to the sawmill property. Work in the construction of the mill and such necessary improvements and appurtenances is clearly separate and distinct from work in the operation of the mill. The former is clearly not within the descriptive words of the statute; the latter is.

It follows from what has preceded that the evidence does not support a verdict in plaintiff's favor for all the work done by him between the 21st day of October, 1894, and the 21st day of September, 1895. That necessarily leads to the consideration of another question, which does not appear to have occurred to the trial court or counsel for the appellants, but should be determined on this appeal for the purposes of a new trial.

Sec. 3331, S. & B. Ann. Stats., provides that, for work done between the 1st day of November and the 1st day of May following, the claim for a lien shall be filed on or before the 1st day of June following, and for work done after the 1st day of May and before the 1st day of November following, or for continuous work from the 1st day of November, or a day prior thereto, to and beyond the 1st day of May following, the claim for a lien shall be filed within thirty days after the last day of doing such work. This language received construction in *McGinley v. Laycock*, 94 Wis. 205, to the effect that the plain legislative intent of the statute was to divide claims for liens into three classes, with reference to the time of filing the lien petition: First, claims for work done between the 1st day of November and the 1st

day of May following, whether continuous or not, the particular dates being used inclusively; second, work done after the 1st day of May and before the 1st day of November following, whether continuous or not, the dates being used exclusively; and third, work commenced on the 1st day of November or a day prior thereto, and continued to a day after the 1st day of May following. This classification was obviously made so as to fairly protect the laborers without unnecessarily inflicting loss and damage upon other interests,— particularly the interests of those who might deal with the property in the regular course of trade and commerce. To that end, considering that work done from the 1st day of November to the 1st day of May following is ordinarily in logging operations, and is continuous, so that such work itself reasonably furnishes notice of the existence of the lien, and that during such period business transactions in regard to transfers of the property are ordinarily not active, the laborer is given till the 1st day of June following to file his claim for a lien therefor; and considering that from the 1st day of May to the 1st day of November following, which includes the manufacturing season, when the manufactured product is ordinarily moved within short periods, and disposed of to consumers in the due course of trade and commerce, thirty days from the completion of the work is limited for filing the claim; and considering that continuity of work reasonably furnishes notice of the existence of a lien for work done, commencing on the 1st day of November, or a day prior thereto, and continuing to a day after the 1st day of May following, the laborer is given thirty days after the completion of such work to file his lien petition. From this it is clear that, when a claim for a lien for work done prior to the 1st day of May in any year is not filed till after the 1st day of June following, it is absolutely essential to the maintenance of such lien that it be shown that the work commenced on the 1st day of the November preceding, or a

day prior thereto, and continued without material interruption to within thirty days of the time of such filing. The abandonment of the work for any period within the time mentioned, or the doing of work of a character not within the statute, breaks the necessary continuity required, and is fatal to the claim for all work done prior to the 1st day of May preceding such filing.

It follows from what has preceded that the work done by plaintiff before the 1st day of November, 1894, was lost by failure to file the lien claim within thirty days after its completion, and that the work done in building the docks, driving piles, and making tramways, for which plaintiff was not entitled to a lien, broke the continuity of his lienable work done on and after the 1st day of November, 1894, so that the filing of the claim October 9, 1895, was only effectual to preserve to plaintiff his lien for the lienable work done after the 1st day of May preceding.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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96 664
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McCann and another, Respondents, vs. Chicago, St. Paul, Minneapolis & Omaha Railway Company, Appellant.

June 12 — June 24, 1897.

Railroads: Fences: Killing of horses: Contributory negligence.

A person in charge of horses, with knowledge of an opening in the fence along a railway right of way, turned them into a pasture not far distant, the fences of which he knew or ought to have known had been partially destroyed by forest fires a short time previous, so that the horses readily escaped and reached said opening. *Held*, that he was guilty of contributory negligence which would preclude recovery for the killing of the horses by a passing train.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Plaintiffs' horses escaped from his pasture, and went upon defendant's right of way at a private crossing, where the gate had been destroyed for such time as to charge defendant with notice of it, and were fatally injured by a passing train. This action was brought to recover the loss upon the ground that it was caused by defendant's failure to keep its track fenced. The defense was contributory negligence. At the close of the evidence a motion was made to direct a verdict in defendant's favor because the evidence conclusively showed that the person in charge of the horses was guilty of contributory negligence, which was imputable to plaintiffs and fatal to a recovery. The motion was denied. A verdict was rendered in favor of plaintiffs. There was a motion to set the verdict aside, which was overruled. Judgment was rendered in plaintiffs' favor, and defendant appealed.

For the appellant there was a brief by *Tomkins & Merrill*, and oral argument by *W. M. Tomkins.* To the point that it was contributory negligence to turn the horses out in the pasture with knowledge that the fences had been destroyed, they cited *Jones v. S. & F. du L. R. Co.* 42 Wis. 306; *Curry v. C. & N. W. R. Co.* 43 id. 665; *Richardson v. C. & N. W. R. Co.* 56 id. 347; *Martin v. Stewart,* 73 id. 553; *Peterson v. N. P. R. Co.* 86 id. 206; *Oeflein v. Zautcke,* 92 id. 176; *Carey v. C., M. & St. P. R. Co.* 61 id. 71.

For the respondents the cause was submitted on the brief of *O'Keefe & Copeman.*

MARSHALL, J. The sole question on this appeal is, Did the court err in not granting defendant's motion for a verdict? That turns on whether the undisputed facts conclusively show contributory negligence on the part of the person who had charge of the horses. The evidence shows, with-

out question, that such person knew of the opening in the railway right of way at the crossing when he turned the horses loose on the premises of one Day, a short distance from such opening; that such premises were inclosed originally, partly by a wire fence, partly by a creek, partly by a pole fence, and partly by a swamp; that some time before the horses were injured a fire went across the premises, largely destroying the fences, so that the horses could readily escape and reach the open gate in defendant's right-of-way fence. In respect to the fire and the conduct of plaintiffs' agent in regard to the fence, the trial court, in his charge to the jury, stated that it was undisputed that forest fires had been raging on or about the premises where the horses were pastured for some time prior to their being injured; that the fence which had been erected to restrain horses and stock from wandering beyond the pasture had been destroyed for about two weeks; that the person in charge of the horses made no effort to rebuild the fence after it was destroyed, or even to ascertain whether it was injured by the fire, which he knew had passed through the premises. From such undisputed facts no other inference could reasonably be drawn than that such conduct constituted want of ordinary care, and that it contributed to the result complained of. The person in charge of the horses did not exercise any care whatever. With knowledge of the opening in the right-of-way fence, and of the destruction of the pasture fence, or of facts which should have moved him to discover the true situation in that regard,—in short, though circumstanced so that he knew, or ought to have known, the situation which permitted the horses to escape from the pasture and go upon the right of way,—he turned them out, regardless of consequences. This precludes any recovery for damages, under repeated decisions of this court in similar cases. *Curry v. C. & N. W. R. Co.* 43 Wis. 665;

Richardson v. C. & N. W. R. Co. 56 Wis. 347; *Peterson v. N. P. R. Co.* 86 Wis. 206. Defendant's motion for a verdict should have been granted; hence the judgment of the trial court must be reversed.

By the Court.— So ordered.

ROBY, Plaintiff in error, vs. THE STATE, Defendant in error.

June 14 — June 24, 1897.

Criminal law and practice: Evidence: Plea in abatement: Reversal after completion of sentence.

1. In a prosecution for the larceny of a bank draft, a letter purporting to have been written by the cashier of the bank which issued the draft (who was not present at the trial) to the payee, tending, perhaps, to raise a doubt as to the genuineness of the latter's indorsement of the draft, was inadmissible; and its admission constituted a prejudicial error whether the matter contained therein was material or not.
2. Where an unverified plea in abatement is returned as a part of the record, and there is nothing to show that it was ever brought to the attention of the court or ruled upon, it will be presumed that the court refused to receive the plea because not properly proven as required by sec. 4647, R. S.
3. Where a person has prosecuted a writ of error while serving his sentence, the fact that his sentence expired before the decision of his case does not affect his right to a reversal of the judgment, if erroneous.

ERROR to review a judgment of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

This is a criminal action for the larceny of a bank draft for the sum of $340.50. The information contained a second count for receiving and concealing said draft knowing it to be stolen, and a general verdict of guilty was rendered, and to reverse the sentence thereon this writ of error was prosecuted.

The evidence upon the trial showed that in the latter part of April, 1894, one August Affeld found a letter on the highway containing a bank draft payable to the order of Lucy S. Rice in the sum of $340.50. The draft was issued by James M. Wilkinson, a banker at Marquette, Michigan, April 21, 1894, was signed by A. F. Marquard, cashier, and was drawn upon the Merchants' Loan & Trust Company, of Chicago, Illinois. This draft was found on the road between the city of Juneau and the home of said Lucy S. Rice. It appears that Affeld made several attempts to get said draft cashed, but did not succeed owing to the fact that it was not indorsed by Mrs. Rice. Afterwards he turned the draft over to one Ernst Hilgendorf, his cousin, who also attempted to get the draft cashed but failed. Later Hilgendorf turned the draft over to the defendant, *Roby*. At the time of this last transfer the evidence tends to show that the draft had the name of Lucy S. Rice upon the back, but the evidence does not show who wrote it. *Roby* claims to have been innocent in the matter, and to have supposed that the draft was the property of Hilgendorf and was properly indorsed by Mrs. Rice. He succeeded in getting the draft cashed in the city of Watertown, the same being indorsed by Hilgendorf, *Roby*, and one George Lempke. He retained $110 of the money that Hilgendorf had agreed he might retain, and the balance he turned over to Hilgendorf. Mrs. Rice was not called as a witness on the trial, nor was any direct testimony given to show that she had not authorized her name to be signed upon the back of the draft, although there was evidence tending to show that the signature was not in her handwriting. There was introduced upon the trial a letter purporting to have been written by Marquard, the cashier of the bank which issued the draft, to Mrs. Rice, June 2, 1894, which letter is as follows:

"Dear Madam: On April 21st Mr. Robert Shaw purchased one draft, No. 39,125, on Chicago, for $340.50, payable to

your order. He shows us your letter of May 26th to-day, claiming that you have never received the draft. On May 15th the German National Bank of Beaver Dam, Wisconsin, sent us this draft, with your name on the back, and purporting to be signed by you, and asking us to remit to them if we knew your signature. We did not know it, so returned draft to them. If you did not receive and put your name on the draft, some one has gotten possession of it who was not entitled to it, and I have written our Chicago correspondent to-day, stopping payment on the same."

The envelope containing the letter was also offered in evidence, with the postmark thereon.

J. E. Malone, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *John L. Erdall*, assistant attorney general, and oral argument by *Mr. Erdall.*

WINSLOW, J. The letter of the bank cashier in Michigan to Mrs. Rice was clearly inadmissible. It was the unsworn statement of a man in Michigan not present at the trial and not subject to cross-examination. Whether the statements contained in the letter were material or not, we regard its admission as prejudicial error, which must result in a reversal of the judgment. The defendant had a right to be tried upon evidence legally admissible. If the statements made in the letter concerned material facts in dispute and necessary to conviction, then the error is clearly prejudicial. If, on the other hand, the statements made in the letter, or the inferences naturally resulting therefrom, concerned matters not in issue and immaterial to the controversy, the error is also prejudicial, because it cannot be doubted from inspection of the letter that such facts and inferences were unfavorable to the defendant. In either event a new trial is necessary.

It is claimed by the plaintiff in error that he interposed a

plea in abatement, on the ground that he had had no preliminary examination, and that the plea was improperly overruled without issue being taken thereon. We find among the papers returned in the case as the record an unverified plea of this kind, but we find nowhere in the record or bill of exceptions anything showing that the plea was ever brought to the attention of the court or ruled upon. In this situation of the record, we must assume that the court refused to receive the plea because it was not proven by affidavit or other evidence, as provided by sec. 4647, R. S.

It appears by the record that the plaintiff in error was sentenced to one year's imprisonment in May, 1896, and consequently that his term must now have expired. This fact, however, makes no difference with the disposition of the case. A person convicted of crime may prosecute his writ of error while serving his sentence, and the fact that he may serve out his entire sentence before the decision of his case does not affect his right to a reversal of the judgment if it be erroneous. The mere payment of a judgment in a civil cause does not operate to bar or waive the right to appeal therefrom (*Sloane v. Anderson*, 57 Wis. 123), and for stronger reasons the compulsory working out of a judgment in a criminal case does not debar a man from obtaining a reversal of an erroneous conviction, and thus removing the stigma which wrongly rests on his name and reputation.

By the Court.— Judgment reversed, and action remanded for a new trial.

VON RUEDEN and others, Plaintiffs in error, vs. THE STATE, Defendant in error.

June 14—June 24, 1897.

Criminal law and practice: Disturbing public meeting: Construction of statute: Jeopardy: Sentence: Costs.

1. Sec. 4597, R. S. (providing for the punishment of any one who wilfully interrupts or molests "any assembly or meeting of people, for religious worship or for other purposes, lawfully and peaceably assembled"), is not confined to religious meetings or assemblies, but includes all lawful meetings of the people.
2. The complaint in a prosecution under sec. 4597, R. S., need not allege the special facts showing the purpose or character of the meeting, an averment in the language of the statute that the meeting was lawfully and peaceably assembled being sufficient.
3. The defendant in a criminal prosecution who has been discharged on his own motion on the ground of the insufficiency of the complaint has not been put in jeopardy; and such discharge is no bar to a prosecution for the same offense upon another complaint.
4. Where several defendants are tried together for the same offense, a sentence that each pay a certain fine, and the costs, taxed at a gross sum, is not erroneous, each defendant being liable for the entire costs.

ERROR to review a judgment of the municipal court for the eastern district of Waukesha county: D. S. TULLAR, Judge. *Affirmed.*

The plaintiffs in error, *Joseph Von Rueden*, *John Bealand*, and *Edward Sargeant*, were arrested, tried, and convicted of having, on the 15th day of June, 1896, at the town of Eagle, in Waukesha county, "wilfully and unlawfully and maliciously interrupted and molested an assembly or meeting of people lawfully and peaceably assembled on the public highway for the purpose of listening to a certain lecture delivered by one M. J. Fanning, in said town, in this: that the accused then and there made loud noises by blowing tin horns and firing shotguns for the purpose of interrupting

said meeting and molesting the people there peaceably assembled, contrary to the statute," etc. The defendants pleaded in bar that June 24, 1896, the same identical cause of action was pending against them before the same court, and they were placed on trial and in jeopardy (annexing to said plea a copy of the former complaint); that after testimony taken, the court having jurisdiction, etc., on their motion they were acquitted and discharged from custody. The complaint was identical with the one upon which they were tried in the present case, except that it did not state how or by what means the accused disturbed the alleged meeting. There was no reply to the plea, but the record shows that when the defendants were brought before the court on the first complaint for trial and a witness had been sworn, they objected to the introduction of any evidence under the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and the court sustained the objection, and the defendants were discharged. The court overruled the plea in bar. A similar objection to the second complaint was made and overruled, and the trial proceeded, the defendants having pleaded not guilty. After verdict of guilty, a motion for a new trial was made, and also a motion in arrest of judgment, founded on alleged defects in the complaint and proceedings, and that the statute (R. S. sec. 4597) did not apply to cases of disturbance of other than religious meetings, or meetings for other like purposes. These motions were denied, and the court sentenced each of the defendants to pay a fine of $5 and the costs of prosecution, and in default of payment of the same that each of the defendants be committed to jail at hard labor until the fine and costs are paid or they are discharged, not exceeding three months.

D. J. Hemlock, for the plaintiffs in error, contended, *inter alia*, that under the rule *noscitur a sociis* the effect of sec. 4597, R. S., should be limited to the molestation of meetings

held for religious worship or other like purposes. *State v. Black*, 75 Wis. 490; *Jensen v. State*, 60 id. 578; *State ex rel. Kennedy v. McGarry*, 21 id. 496; *Morse v. Buffalo F. & M. Ins. Co.* 30 id. 534; *Edson v. Hayden*, 20 id. 682; *Bevitt v. Crandall*, 19 id. 583; *Attorney Gen. v. Railroad Cos.* 35 id. 519; *Campbell v. Campbell*, 37 id. 218; *Sawyer v. Dodge Co. Mut. Ins. Co.* id. 503; *Cleaver v. Cleaver*, 39 id. 102; *Gibson v. Gibson*, 43 id. 33; *Kelley v. Madison*, id. 645; *Wis. Cent. R. Co. v. Smith*, 52 id. 144; *Blake v. Blake*, 75 id. 343.

For the defendant in error there was a brief by the *Attorney General* and *John L. Erdall*, assistant attorney general, and oral argument by the *Attorney General.*

PINNEY, J. 1. The statute under which the plaintiffs in error were convicted provides that "any person who shall at any time wilfully interrupt or molest any assembly or meeting of people, for religious worship or for other purposes, lawfully and peaceably assembled, shall be punished by fine," etc. [R. S. sec. 4597.] It is objected that the complaint is defective in not showing that the meeting mentioned was assembled for worship or other like purpose, and that the nature and purpose of the lecture or assembly should have been stated to enable the court to say that it was a lawful assemblage. The contention is that the rule of construction, *noscitur a sociis*, applies, and that the statute is not applicable to all assemblies or meetings of people, lawfully and peaceably assembled.

The right of the people peaceably to assemble to consult for the common good is so important in a free government that it has been secured by constitutional provision (Const. art. IV, sec. 1), and there is no statute, that we are aware of, which extends to and protects all assemblies and meetings of people, lawfully and peaceably assembled, from interruption or molestation, unless the statute quoted has such general application. The rule which counsel invokes is a

familiar one, and has been frequently applied, especially in the interpretation of criminal statutes, and he has cited many cases illustrating its use and application. *Bevitt v. Crandall*, 19 Wis. 583; *Edson v. Hayden*, 20 Wis. 684; *Morse v. Buffalo F. & M. Ins. Co.* 30 Wis. 534; *Jensen v. State*, 60 Wis. 578; *State v. Black*, 75 Wis. 490. The cases on this subject will be found, upon examination, to rest mainly upon the rule that "when there are general words following particular and specific words, the former must be confined to things of the same kind" (Suth. Stat. Const. § 268); and the rule laid down by Lord Bacon is that "the coupling of words together shows that they are to be understood in the same sense" (Broom, Leg. Max. 588). The rule *noscitur a sociis* is one of interpretation only, and will not prevail where it is clear that the words were not used in the same sense. Here are no associated words. There is a single purpose specified in the statute, namely, to protect religious meetings, and it is followed by language evidently intended to extend the same protection to all meetings for other purposes which are clearly within the policy and purpose of the act. It is said that the general object of the act sometimes requires that the final generic word shall not be restricted in meaning by its predecessors (Endlich, Interp. Stat. § 410), and that the rule invoked is merely an aid in ascertaining the legislative intention, and does not justify the court in restraining the operation of the statute within limits narrower than those intended by the legislature. *Woodworth v. State*, 26 Ohio St. 196. The limitation in the statute is to all meetings of people "lawfully and peaceably assembled."

This view is sustained by the history of the enactment. It was originally a provision making it a penal offense for any one "on the Lord's day, or at any other time," to "wilfully interrupt or disturb any assembly of people met for the worship of God, within the place of meeting, or out of it." R. S. 1849, ch. 139, sec. 16. By the revision of 1858

the act was further extended so as to protect persons "when meeting or met together for the performance of any duties enjoined on or pertaining to them as members of any religious society, or for the recitation or performance of or instruction in vocal music." R. S. 1858, ch. 183, sec. 6. And by ch. 145, Laws of 1866, it was further extended so as to protect "any wedding party or other company or assembly of peaceable citizens," and by the revision of 1878 it was placed in its present form, and the revisers, in their notes, say it is "made general, and to embrace all lawful meetings of the people." The history and the reason and spirit of the enactment show that any assembly or meeting of the people, lawfully and peaceably assembled, is within its protection.

2. The offense is a statutory one, and it was not necessary to allege the special facts showing the purpose or character of the meeting or assembly. It was enough to aver, in the language of the statute, that the meeting or assembly was lawfully and peaceably assembled. *Howard v. State*, 87 Ind. 70; *Cooper v. State*, 75 Ind. 62. The complaint appears to be sufficient, and the objection to the reception of evidence under it was properly overruled.

3. There is but a single record of the proceedings on both complaints, and it appears that the discharge of the plaintiffs in error from the first complaint was made upon their own motion, and on the ground "of the insufficiency of the complaint;" that the motion was granted, and the case dismissed, and the defendants discharged. The record proceeds to show that a new complaint was made and filed, and a warrant issued, under which this conviction was had. The averment of the plea is that in the former prosecution there was a "good and sufficient complaint." It is not alleged that they were tried under the former complaint, but that, on motion of the defendants, they were acquitted and discharged from custody. The court, without requiring an issue of fact or of law to be joined on the plea as the practice required,

overruled it. Upon the face of the plea and the whole record produced, we cannot say that the defendants were in jeopardy of punishment under the former complaint. If the discharge thus pleaded was erroneous, the state could not have maintained a writ of error to procure its reversal. *State v. Kemp*, 17 Wis. 669. The jeopardy of which the defendants complain had ceased at their own request and for their benefit, and therefore they might be proceeded against anew on a second complaint. 1 Bish. Crim. Law, § 1000; 1 Bish. Crim. Proc. § 544. The defendants cannot now be allowed to say, when the former proceeding comes in question in this collateral way, there being no method of reviewing or reversing it, that the complaint in that case was valid and sufficient. From the judgment thereon as pleaded we must take it as a settled point that the complaint was insufficient, however the fact may be, and that the defendants were not in jeopardy under it. *People v. Casborus*, 13 Johns. 351; *Shepherd v. People*, 25 N. Y. 420. In *Comm. v. Gould*, 12 Gray, 173, the rule is stated that "when an original indictment is quashed, adjudged bad on demurrer, or when judgment thereon is arrested for a defect therein, it is held that the accused has not thereby been in jeopardy," within the meaning of the maxim that no one shall be brought into jeopardy more than once for the same offense. *Comm. v. Roby*, 12 Pick. 502. It is manifest upon its face that the plea was insufficient, and the defendants have not been prejudiced by the fact that the court overruled it. *Lester v. State*, 91 Wis. 249.

There were some exceptions as to rulings upon the evidence, and other matters arising at the trial, but they do not seem to require special notice.

4. The objection to the form of the judgment, that each defendant pay a fine of $5 and the costs, taxed at a gross sum, is not well taken. S. & B. Ann. Stats. sec. 4633. The court was not required to specify the portion of costs to be

paid by each defendant. Each is liable for the entire costs, and the judgment might properly be general as to the costs. 1 Bish. Crim. Proc. § 1035; *Johnson v. State*, 29 N. J. Law, 453–455.

We do not find any reversible error in the record.

By the Court.— The judgment of the municipal court for the eastern district of Waukesha county is affirmed.

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Abatement and survival: Assignment. See BANKS AND BANKING, 2.

1. A cause of action for damages growing out of a conspiracy to defraud by purchasing and disposing of goods without paying for them is not one for damages done to personal estate, within the meaning of sec. 4253, R. S. (providing that "actions for damages done to real and personal estates" shall survive), and is not assignable. *John V. Farwell Co. v. Wolf,* 10

By whom to be brought — Who may maintain. See CONTRACTS, 3, 6. CORPORATIONS, 13. COUNTIES, 1. TAXATION, 7.

Commencement. See TAX TITLES, 3.

Conditions precedent. See CONTRACTS, 4. GUARANTY, 1. TAXATION, 1–4.

Limitations. See COURTS, 2. PARTNERSHIP, 1. TAX TITLES, 1–3.

Civil or criminal?

2. An action by a city to recover a penalty for the violation of a municipal ordinance prohibiting an act which is a crime or misdemeanor and punishable at common law or by statute, and prescribing a penalty for its violation by fine with imprisonment on default of payment, is *quasi*-criminal. *State ex rel. Milwaukee v. Newman,* 258

At law or in equity? See BANKS AND BANKING, 3. EQUITY, 3.

3. If a person in good faith brings an action in equity alleging facts sufficient to constitute a good cause of action within some recognized principle of equity jurisprudence, but fails to establish some fact essential thereto, yet does establish a state of facts entitling him to some relief by way of damages or otherwise, the court will

not dismiss the bill and thereby render further litigation necessary, but will retain it and render such judgment as will do complete justice between the parties. *Franey v. Warner*, 222

4. The intention of a pleader in setting up facts pertinent to a claim for equitable relief by rescission of the sale and conveyance of certain land, but not material to a legal action for the recovery of a mere money judgment, is *held* to have been to state an equitable cause of action, even though the prayer for relief demanded judgment for an amount equal to the consideration paid for the conveyance as well as for the rescission. *Topping v. Parish*, 378

ADMINISTRATORS AND EXECUTORS. See BANKS AND BANKING, 2. COURTS, 2, 3. PARTNERSHIP. WILLS.

ADMIRALTY and maritime jurisdiction. See LIENS, 10–14.

ADVERSE POSSESSION. See TENANTS IN COMMON.

AGENCY.

See ATTACHMENT, 2. CORPORATIONS, 15, 19. EQUITY, 5.

1. In an action on a promissory note given to the manufacturer of threshing machines by one of its agents, who had been employed under a contract making him personally liable for all machines sold unless settled for by cash or notes before delivery, in payment for a second-hand machine which he had sold on his own responsibility and which had been returned to him because failing to work as represented, the question whether the transaction amounted to a sale of the machine to the defendant entirely outside the contract of agency, thus enabling him to insist upon an express warranty, is *held*, upon the evidence, to have been for the jury. *Minnesota T. M. Co. v. Wolfram*, 481

2. Evidence in such case that, after some correspondence in respect to the return of the machine and rescission, the transaction was adjusted by the defendant with plaintiff's general agent, in pursuance of which the tools and extras which had been furnished with the machine were returned and credited to defendant, and plaintiff sent him an invoice of the outfit, by which it was consigned to him for sale on commission and charged to him at the regular agent's price,— rendered the question of rescission also for the jury. *Ibid.*

3. A contract of agency for the sale of farm machinery provided for the payment of a certain commission upon machines sold and settled for, to be earned not by obtaining the orders alone, but by receiving and setting up the machines, instructing the purchasers in their use, and securing settlements for them. It also gave the principal the right to end the contract at any time and take into its possession all orders, notes, accounts, moneys, machines, or other property belonging to it in the hands of the agents. The agents were discharged without cause after they had obtained orders and before the same had been filled. *Held*, that they were entitled to recover only a reasonable remuneration for their services in obtaining orders which were afterwards actually filled with the principal's machines. *Merriman v. McCormick H. M. Co.* 600

4. The failure of the agents in such a case to surrender orders already obtained, upon the termination of the contract, in compliance with its terms, would not prevent them from recovering the reasonable value of their services in obtaining such as the principal afterwards actually filled. *Ibid.*

5. Contracts appointed N. as agent "for the sale, on commission," of plaintiff's machines, fixed the commission at the amount received above net prices quoted, and ordered certain machines to be shipped on or before a certain date, to be paid for "one half six months, balance eighteen months, in farmers' notes," final settlements to be made on certain dates, and discounts made for cash. They also provided, among other things, that all machines and their proceeds were to remain the property of plaintiff until so settled and paid for; that settlement should be made at any time on demand of plaintiff, and the entire proceeds of sales turned over to it; that the plaintiff should pay N. his commission from such proceeds; that all notes, taken in payment for machines, which did not comply with the terms of the contract should be applied on N.'s commission; that N. should pay the plaintiff fifty per cent. of all losses by reason of uncollectible notes, upon their being assigned to him; and that he should pay all freight, taxes, and insurance on machines ordered, and all damages sustained to them by reason of their not being properly housed. *Held*, that the contracts called for consignments of goods to be settled for out of the proceeds of sales, and were not contracts of conditional sale. *Monitor Mfg. Co. v. Jones*, 619

AMENDMENT.
Of pleading. See APPEAL, 12.
Of claim for lien. See LIENS, 5.
Of assignment proceedings. See VOLUNTARY ASSIGNMENT, 1.

ANIMALS: Killing on track. See RAILROADS, 8.

APPEAL TO SUPREME COURT.

Not exclusive remedy. See WRIT OF ERROR.

From what may be taken: Orders.

1. Under ch. 212, Laws of 1895 (a revision of sec. 3069, R. S., relating to appeals, from which the provision authorizing an appeal from an order when it grants or refuses a new trial was omitted), an order denying a motion for judgment on the verdict and granting a new trial on the ground of errors in the instructions to the jury is not appealable; and the fact that the appeal was taken from that part of the order only denying the motion for judgment is immaterial. *Rottsoll v. Two Rivers Mfg. Co.* 324

2. A stay of proceedings is not an injunction within the meaning of sec. 2773, R. S. (abolishing the writ of injunction, and substituting therefor "a command to refrain from a particular act"). An order denying such a stay, therefore, is not appealable under the provision of ch. 212, Laws of 1895, allowing an appeal from an order which "grants, refuses, continues, or dissolves an injunction." *Rossiter v. Ætna Life Ins. Co.* 466

3. In an action for an accounting the trial judge after a hearing filed findings of fact and conclusions of law and ordered that upon the basis thereby determined an accounting be had. No other judgment or order was entered. *Held*, that the order was an order of reference for taking an account, which did not determine the rights of any of the parties, and was therefore not appealable under ch. 212, Laws of 1895. *Hyde v. German Nat. Bank*, 406

Jurisdiction: Consent of parties.

4. Consent of the parties cannot confer jurisdiction upon the supreme court to entertain an appeal. *Ibid.*

Loss of right to appeal.

5. A party loses his right to appeal directly from an order granting a new trial by failing to perfect his appeal before judgment is rendered on the verdict given on the second trial, in which both parties participated. *Keller v. Gilman,* 445

Guardian ad litem: Leave of court.

6. A guardian *ad litem* may take an appeal without leave of court, and it is his duty to do so if, after a careful examination of the case, he deems that course necessary for the protection of his ward. *Jones v. Roberts,* 427

Waiver of objections.

7. On an appeal from an irregular judgment, taken within the time provided by law, delay in moving to set the judgment aside cannot be held to constitute a waiver of the irregularity. *Packard v. Kinzie Ave. Heights Co.* 114

8. The objection that certain findings of a special verdict should have been set aside as contrary to the undisputed evidence, and judgment given on the other findings and such evidence, is not available on appeal unless a motion to that effect was first made in the trial court. *Conroy v. C., St. P., M. & O. R. Co.* 243

Record: Bill of exceptions.

9. An order granting a new trial does not necessarily affect the judgment within the meaning of sec. 3070, R. S., allowing intermediate orders and determinations which involve the merits and necessarily affect the judgment to be reviewed upon appeal, whether excepted to or not, where they appear upon the record. Such an order, and the matter upon which it is founded, does not therefore become a part of the record, and cannot be reviewed on appeal from the judgment rendered on the second trial unless incorporated into the bill of exceptions. *Keller v. Gilman,* 445

Findings of fact, when disturbed.

10. Findings of the trial court cannot be disturbed unless they are clearly against the preponderance of the evidence. *Clausen v. Hale,* 100

11. The rule that findings of the trial court or of a referee will not be disturbed unless clearly against the preponderance of the evidence applies to all trials by the court or a referee, in equitable as well as in legal actions, including cases where the testimony is taken by a referee and reported to the court. *Momsen v. Plankinton,* 166

Affirmance and reversal: Material and immaterial errors. See CRIMINAL LAW. 4, 6, 10. DAMAGES, 1. INSTRUCTIONS TO JURY. PRACTICE. RAILROADS, 15, 18. VERDICT, 2. WILLS, 3.

12. Defects in the complaint constitute no ground for reversal of a judgment in plaintiff's favor where they might have been cured at any time by amendment conforming the pleading to the facts conclusively proved by evidence admitted without objection. *Hubbard v. Haley,* 578

13. Where the same matter is pleaded both in abatement and in bar, the direction of a verdict for the defendant on the plea in bar, after trial on the merits, without finding on the plea in abatement, is not error prejudicial to the plaintiff. *McCue v. Waupun,* 625

Costs. See WILLS, 7, 8.

APPEAL FROM JUSTICE'S COURT. See EVIDENCE. JUSTICES' COURTS.

APPEAL FROM COMMON COUNCIL. See MUNICIPAL CORPORATIONS, 9.
APPEALABLE ORDERS. See APPEAL, 1–5.
APPEARANCE. See CHANGE OF VENUE, 1. GARNISHMENT.
APPORTIONMENT of indebtedness. See MUNICIPAL CORPORATIONS, 7.
ARBITRATION. See INSURANCE, 3.
ARCHITECTS. See CONTRACTS, 8.
ARGUMENTS to jury: Improper remarks: Error, how cured. See PRACTICE.
ASSAULT. See PLEADING, 1.
ASSESSMENT for taxation. See MUNICIPAL CORPORATIONS, 5. TAXATION, 5–7.
ASSESSMENTS for local improvements. See TAXATION, 1–4. TAX TITLES, 4, 5.
ASSIGNMENT.
Of cause of action. See ACTION, 1. CORPORATIONS, 12, 13. COSTS, 1.
Of contract. See CONTRACTS, 1.
Of corporate stock. See BANKS AND BANKING, 2. CORPORATIONS, 5.
For benefit of creditors. See VOLUNTARY ASSIGNMENT.

ATTACHMENT.

See DAMAGES, 2.

1. In attachment proceedings against a corporation, the evidence — showing, among other things, that substantially all the stock was owned by the president, who practically exercised the whole power of the corporation; that he kept no systematic books of account and possessed no accurate knowledge of its financial condition; that he conducted his private business and that of the corporation together; that he applied funds of the corporation to his private use when he knew or ought to have known it to be insolvent; that he incurred a large amount of indebtedness in the name of the corporation, and treated its assets as individual property — is *held* to sustain a finding that the corporation had assigned, conveyed, or disposed of its property, or was about to do so, with intent to defraud creditors. *Senour Mfg. Co. v. Clarke*, 469
2. In an action for the conversion of plaintiff's horses by a sheriff who had attached them as the property of her husband, it appeared conclusively that for a long time prior to the attachment the horses had been under the complete and exclusive control of the husband; that upon the release of the attachment the sheriff delivered the horses to third persons in pursuance of a contract of sale entered into with them by the husband as plaintiff's agent; and that the release was procured by attorneys in the employ of the husband. *Held*, that the horses had been in legal effect redelivered to the husband, even though the contract of sale was not binding upon plaintiff. *Dishneau v. Newton*, 531
3. A writ of attachment is not entirely void because issued to collect a debt part of which was not due, even though all the statutory requisites of an attachment for a debt not due had not been complied with, the debtor's remedy being limited to a modification of the writ and a release of the property as to the debt not due, under sec. 2744, R. S. *Hubbard v. Haley*, 578

ATTORNEYS AT LAW. See COUNTIES, 2–4. PRACTICE.

BANKS AND BANKING.

See CORPORATIONS, 22. COURTS, 2, 3. CRIMINAL LAW, 1–4. VOLUNTARY ASSIGNMENT, 2.

1. A bank having money on open account to the credit of the maker of a note which it holds is not obliged to apply the money thereon before bringing suit, even if it has the right to make such application without consent. *Docter v. Riedel*, 158
2. Upon the death of a stockholder in a bank his statutory liability for the debts of the bank under sec. 47, ch. 479, Laws of 1852 (S. & B. Ann. Stats., p. 1228), survives in respect to his estate in the hands of his personal representatives, and may be enforced, without an assignment of the stock to them on the books of the bank, to the extent of the assets received by them. *Gianella v. Bigelow*, 185
3. The statutory liability of a stockholder for the debts of a bank under sec. 47, ch. 479, Laws of 1852 (S. & B. Ann. Stats., p. 1228), is a liability of all the stockholders to all the creditors, on the principle of copartnership, and can be enforced only by proceedings in equity, to which the bank and all its stockholders must be made parties unless it is impossible or impracticable to bring them all before the court. *Ibid.*

BILL OF EXCEPTIONS. See APPEAL, 9.

BONA FIDE PURCHASER. See CORPORATIONS, 8. DEBTOR AND CREDITOR, 1, 3. DEEDS, 5. EQUITY, 5. LIENS, 2. RECORDING ACTS.

BOND of assignee. See VOLUNTARY ASSIGNMENT, 1.

BOUNDARIES.

1. Evidence of undisputed occupation and fencing for about thirty years in accordance with measurements based upon a reputed government quarter-section line, not only of the piece of land in controversy but of other parcels in that immediate neighborhood, raises a presumption that the line so recognized is the true one; and such presumption is not overcome by evidence that upon a resurvey, based upon no monuments, another line several rods distant was established. *Welton v. Poynter*, 346
2. In an action of ejectment involving a disputed boundary, evidence — showing, among other things, that the plaintiff and those through whom he claimed had for nearly thirty years held under deeds describing the eastern boundary of their premises as eight rods east of a certain quarter-section line, and that for such time a fence had stood upon a line eight rods east of the reputed quarter-section line, and plaintiff and his grantors had occupied up to such line fence and no further, without controversy — is *held* sufficient to show a location of the true line by the parties, followed by such long acquiescence as to make it binding on them and their privies. *Ibid.*

BURDEN OF PROOF. See RAILROADS, 19.

CANCELLATION of patent of land. See TAXATION, 8.

CARRIERS. See LIENS, 10–14. RAILROADS, 6–15.

CASES DISTINGUISHED, ETC.

1. *Bentley v. Adams*, 92 Wis. 386. See No. 7.

2. *Bostwick v. Estate of Dickson*, 65 Wis. 598 (as to jurisdiction of circuit and county courts), distinguished. *Gianella v. Bigelow*, 199

3. *Button v. Am. Mut. Acc. Asso.* 92 Wis. 83 (as to intentional injuries), distinguished. *Butero v. Travelers' Accident Ins. Co.* 536

4. *Cleveland v. Burnham*, 55 Wis. 598; *Cleveland v. Burnham*, 64 id. 347 (as to enforcement of stockholders' liability), expressions disapproved. *Booth v. Dear*, 516, 521

5. *Cleveland v. Burnham*, 64 Wis. 357 (as to transfer of stock), distinguished and limited. *Gianella v. Bigelow*, 193

6. *Commercial Bank v. Firemen's Ins. Co.* 87 Wis. 297 (as to fraud), distinguished and limited. *F. Dohmen Co. v. Niagara F. Ins. Co.* 40, 54

7. *Cook v. Goodyear*, 79 Wis. 606; *Bentley v. Adams*, 92 id. 386 (as to liens), distinguished. *J. B. Alfree Mfg. Co. v. Henry*, 333

8. *Dean v. Madison*, 9 Wis. 402. See No. 21.

9. *Forster L. Co. v. Atkinson*, 94 Wis. 578 (as to performance of contract by lien claimant), distinguished. *J. B. Alfree Mfg. Co. v. Henry*, 334

10. *Friemark v. Rosenkrans*, 81 Wis. 359; *Noall v. Halonen*, 84 id. 402; *Hender v. Ring*, 90 id. 358 (as to sufficiency of notice of appeal), distinguished. *Clune v. Wright*, 632

11. *Hayes v. Douglas Co.* 92 Wis. 429. See No. 21.

12. *Hender v. Ring*, 90 Wis. 358. See No. 10.

13. *Jenkins v. Rock Co.* 15 Wis. 11. See No. 21.

14. *Johnson v. Milwaukee*, 40 Wis. 315. See No. 21.

15. *Kneeland v. Milwaukee*, 18 Wis. 411. See No. 21.

16. *Lannon v. Hackett*, 49 Wis. 261 (as to jurisdiction of circuit courts), limited and explained. *Gianella v. Bigelow*, 186, 196–9

17. *Liebermann v. Milwaukee*, 89 Wis. 336. See No. 21.

18. *Lovass v. Olson*, 92 Wis. 616 (as to devise), distinguished. *Littlewood's Will*, 608, 611

19. *Lueck v. Heisler*, 87 Wis. 644 (as to want of probable cause), limited and explained. *Strehlow v. Pettit*, 23, 28

20. *McArthur v. G. B. & M. C. Co.* 34 Wis. 139. See No. 29.

21. *Myrick v. La Crosse*, 17 Wis. 442; *Hayes v. Douglas Co.* 92 id. 429; *Watkins v. Zwietusch*, 47 id. 513; *Johnson v. Milwaukee*, 40 id. 315; *Rork v. Smith*, 55 id. 67; *Dean v. Madison*, 9 id. 402; *Jenkins v. Rock Co.* 15 id. 11; *Liebermann v. Milwaukee*, 89 id. 336; *Saunderson v. Herman*, 95 id. 48; *Kneeland v. Milwaukee*, 18 id. 411; *Wells v. Burnham*, 20 id. 112 (as to special assessments), distinguished. *Wells v. Western Paving & Supply Co.* 122, 123

22. *Noall v. Halonen*, 84 Wis. 402. See No. 10.

23. *Perrin v. New London*, 67 Wis. 416 (as to aid to railroad), distinguished. *State ex rel. M., T. & W. R. Co. v. Tomahawk Common Council*, 74, 88

24. *Reed v. Jones*, 15 Wis. 40 (as to evidence based on account books), explained and followed. *F. Dohmen Co. v. Niagara F. Ins. Co.* 47

25. *Rork v. Smith*, 55 Wis. 67. See No. 21.

26. *Saunderson v. Herman*, 95 Wis. 48. See No. 21.

27. *Vilas v. McDonough Mfg. Co.* 91 Wis. 607 (as to priority of liens), followed. *J. B. Alfree Mfg. Co. v. Henry*, 327, 333

28. *Watkins v. Zwietusch*, 47 Wis. 513. See No. 21.

29. *Webber v. Quaw*, 46 Wis. 118; *McArthur v. G. B. & M. C. Co.* 34 id. 139 (as to assignment of cause of action), distinguished. *John V. Farwell Co. v. Wolf*, 17

30. *Wells v. Burnham*, 20 Wis. 112. See No. 21.

CERTIFICATES OF DEPOSIT. See CRIMINAL LAW, 1, 2.

CHANGE OF VENUE.

1. Under sec. 2622, R. S., the venue of an action cannot be changed, without the consent of the court having jurisdiction, by any mere stipulation of the parties; and the appearance of the parties and a trial without objection in the court to which the cause is so attempted to be removed is not a waiver of the want of jurisdiction in that court. *Swan v. Porter*, 34

2. An order for a change of venue, though made pursuant to a stipulation of the parties, is vacated, under sec. 2627, R. S., unless the papers are transmitted within twenty days. *F. Dohmen Co. v. Niagara Fire Ins. Co.* 38

3. A motion in such a case that the clerk be directed to transmit the papers, made after the expiration of the twenty days, not on any ground appealing to the discretion of the court, but on the theory that the order for the change was still in force, could not be treated as a motion for an extension of the time for transmission. *Ibid.*

CHARGING THE JURY. See INSTRUCTIONS TO JURY.

CHATTEL MORTGAGES. See FIXTURES, 1.

CIRCUIT COURT. See COURTS.

CITIES. See MUNICIPAL CORPORATIONS.

CLAIMS.
Against cities. See MUNICIPAL CORPORATIONS, 9.
Against estates of decedents. See COURTS, 2, 3. PARTNERSHIP.
For liens: Amendment. See LIENS, 5.

CO-EMPLOYEES. See RAILROADS, 20.

COMMON CARRIERS. See LIENS, 10–14. RAILROADS, 6–15.

COMMON SCHOOLS. See PUBLIC SCHOOLS.

CONDITIONAL SALE. See AGENCY, 5.

CONDITIONS precedent. See CONTRACTS, 4. GUARANTY, 1. TAXATION, 1, 3, 4.

CONDONATION of breach of duty. See MASTER AND SERVANT, 2.

CONSENT of parties. See APPEAL, 4. CHANGE OF VENUE, 1.

CONSIDERATION. See CONTRACTS, 1–3. RAILROADS, 2.

CONSPIRACY. See ACTION, 1. DAMAGES, 1.

CONSTITUTIONAL LAW. See COURTS. GAMBLING. LIENS, 11. MUNICIPAL CORPORATIONS, 1–6. WRIT OF ERROR.

CONTRACTS.

See AGENCY. ATTACHMENT, 2. CORPORATIONS, 3–5, 7–20. COUNTIES, 2–4. DEEDS. FIXTURES. GUARANTY. INSURANCE. LANDLORD AND TENANT. LIENS, 1, 12, 13. MASTER AND SERVANT, 1–3. MORTGAGES, 2. MUNICIPAL CORPORATIONS, 1. PLEADING, 2. RAILROADS, 2. SALE OF CHATTELS. VENDOR AND PURCHASER.

1. A want of consideration for the assignment of a contract is not a defense to an action by the assignee for money due on such contract. *Silverthorn v. Wylie,* 69

2. Services previously performed on request constitute a good consideration for a promise to pay therefor. *Ibid.*

3. Where the grantee in a conveyance has assumed and agreed to pay, as part of the purchase price of the premises, a debt owing to a third person, the latter may maintain an action on the agreement, although the grantor was not liable for the debt and no consideration passed to the grantee from such third person or his debtor. *Enos v. Sanger,* 150

4. Though a contract provides for the payment of a specified sum for constructing a building, payable upon its completion, if it provides also that upon failure to complete the building the owner may complete it at the contractor's expense, full performance is not a condition precedent to a recovery by the contractor, but upon such completion by the owner the contractor may recover the contract price, less the reasonable cost of completing the building so far as the same could be done practicably, the damage by delay, and the diminished value when completed because of defects not remediable without unreasonable expenditure. *Arndt v. Keller,* 274

5. An agreement by the vendors of a livery and funeral business not to engage in similar business in the same city for five years, and to pay ten dollars per day as stipulated damages for each day's violation thereof, is valid. *Palmer v. Toms,* 367

6. The interest of the purchasers of a business in an agreement by the vendor not to engage in a similar business for a limited time ceases when they dispose of the business, and they cannot recover for a subsequent breach. *Ibid.*

7. A contract of sale of certain lumber, after specifying the quantities and prices, provided that "this lumber . . . can be graded to suit purchaser; the above prices are for what we call log run, worthless culls out." It was also understood that the vendor was to ship the elm lumber to such purchasers as the vendee might find for it. In an action to recover a balance due thereunder it appeared that the defendant had ordered all the elm lumber "of the grade of common or better" to be shipped to Chicago, and the remainder to Centralia, and that the culls were worth less in Chicago than in Centralia. *Held,* that the defendant was entitled to recover as damages, by way of partial defense or counterclaim, the difference between the value, at Chicago, of culls which had been shipped there and their value at Centralia, and the difference in freight between the two points, together with the invoice price of worthless culls which had been shipped to Chicago mingled with the better grades of lumber, and the freight on the same. *Wubur Lumber Co. v. Oberbeck Bros. Mfg. Co.* 383

8. In an action to recover a balance alleged to be due for architect's services, the plaintiff claimed that he first prepared plans, etc., for a two-story building for defendant, under an agreement that he

was to receive for his work, including superintendence, four per cent. of the contract price, but that the building was never constructed; and that subsequently at defendant's request he prepared plans, etc., for a three-story building, and began the superintendence of the same, but was discharged before the work had been completed. Undisputed testimony showed that the value of an architect's services in preparing plans, etc., where his entire compensation had been fixed at four per cent., was two and one-half per cent. of the contract price of the building. *Held*, that the two sets of plans were properly regarded as applying to two different buil lings, and that the plaintiff might recover two and one-half per cent. of the contract price of each. *Hand v. Agen*, 493

CONTRIBUTORY NEGLIGENCE. See RAILROADS, 3, 8–16, 19.

CONVERSION. See ATTACHMENT, 2. MORTGAGES, 4.

CONVEYANCES. See ACTION, 4. CONTRACTS, 3. CORPORATIONS, 7–9. DEBTOR AND CREDITOR. DEEDS. EQUITY. FIXTURES, 2. LIENS, 2. RECORDING ACTS. TAXATION, 8. TAX TITLES. VENDOR AND PURCHASER.

CORPORATIONS.

When corporate powers vest: County agricultural societies.

1. The mere recording of the certificate of organization, etc., of a county agricultural society in the office of the register of deeds, without intention to leave the papers with him and they being in fact withdrawn after being recorded, is not a "filing" thereof within the meaning of sec. 1460, R. S., providing that upon the filing of such papers in said office such society shall have all the powers of a corporation, etc. *Bergeron v. Hobbs*, 641

2. The filing of said papers is a condition precedent to the vesting of corporate powers; and until the provision is complied with the organizers of the society are not acting as a corporation under color of right, so as to relieve them from individual liability for the debts of the society, even though they carried on business under supposed authority to act as a body corporate in entire good faith. MARSHALL, J., dissents, being of the opinion that by the attempt to comply with the law authorizing the formation of the corporation, and the transaction of business in good faith as such, the society became a corporation *de facto*, whose existence could not be questioned collaterally by those who had dealt with it as a corporation. *Ibid.*

Subscriptions to stock, when binding: Fraud of promoters.

3. A written instrument by which the signers "subscribe to the amount set opposite of our [their] respective names in a corporation to be formed" for the purchase of certain land at a specified price, is not a contract between the signers to join in buying the land, but is a mere proposal to take stock, not binding on anybody until accepted by the corporation. When so accepted the subscribers become liable to the corporation to pay for stock to the amount set opposite their names respectively, and the contract cannot thereafter be rescinded for any fraud for which the corporation was not liable. *Franey v. Warner*, 222

4. In an action by one of such subscribers against the corporation to which the land had been conveyed and certain other stockholders who had been its promoters, to rescind the contract and recover the amount paid on the stock on the ground that plaintiff's sub-

scription had been obtained by false representations as to the ownership of the land and the purchase price to be paid, a determination by the trial court acquitting the corporation of all wrong and dismissing the action as to it, left the contract of subscription in full force. A judgment, therefore, which in effect rescinded the contract as to the promoters and awarded a recovery from them of the entire amount paid thereon, was erroneous both because the money had been paid to the corporation on the contract of subscription made with it, and because the plaintiff could not restore the defendants to their former position. *Ibid.*

5. An assignment to defendants of plaintiff's stock which they had never owned would not so restore them to their former position as to warrant a rescission. *Ibid.*

6. Where a person has been induced to subscribe for stock in a corporation to be formed to purchase a certain tract of land by false representations of the promoters that the land was to be purchased of a third person at a certain price, when such promoters had already actually purchased the land at a much less price, he may maintain an action in equity against the promoters for an accounting and a recovery of his proportionate share of the profits retained by them. *Ibid.*

Promoters: Construction of contracts: Mortgages: Liens.

7. An agreement by the promoters of a corporation to construct and operate in a certain city a car factory with a capacity of ten new box cars per day, upon condition that certain citizens should donate a site and a specified bonus, is not fulfilled so as to entitle the corporation to a conveyance of the site unless it appears that the factory erected is capable of constructing the specified number of cars in an ordinary working day of ten hours. *J. A. Fay & Egan Co. v. Brown,* 434

8. A promoter of a corporation, who takes a mortgage from it upon land which it holds under a contract entitling it to a conveyance upon the completion of a factory thereon as specified in the contract, is not an innocent purchaser, and therefore acquires no greater interest in the premises than the corporation had. *Ibid.*

9. The corporation in such case having lost its interest in the land by failure to comply with the contract, the mortgagee had no interest therein which would entitle him to raise the objection that there had been an error in determining the quantity of land upon which a mechanic's lien should be adjudged. *Ibid.*

Contracts: Pleading: Corporate seal.

10. Where a complaint alleged the due execution by a brewing corporation of a written instrument guaranteeing payment of the rent of an hotel, an answer which set up the affirmative defense that it had been released from liability, expressly admitted that the defendant's secretary *signed* the instrument, and denied information sufficient to form a belief as to the other allegations of the complaint, is *held* insufficient to raise the question of the due execution of the contract of guaranty by the corporation. *Winterfield v. Cream City Brewing Co.* 239

11. The use of a corporate seal is unnecessary except where the use of a seal would be required from an individual. *Ibid.*

Ultra vires.

12. A corporation organized for the purpose of carrying on a general dry goods business is not authorized to purchase the claims of others

for damages growing out of a conspiracy to defraud such others and itself, where such purchase is not necessary to preserve its own property or protect its legitimate interests. *John V. Farwell Co. v. Wolf*, 10

13. If a corporation purchases, pays for, and takes an assignment of a cause of action respecting matters outside the purposes of its creation and not authorized by its charter, in any action to enforce such cause of action want of corporate power to engage in such business cannot be interposed as a defense. *Ibid.*

14. It was not *ultra vires* for a brewing corporation to guarantee payment of the rent of an hotel, the bar fixtures and furniture of which it owned and in which its beer was to be sold. *Winterfield v. Cream City Brewing Co.* 239

15. Where one of the purposes of a corporation, as specified in its articles of organization, was to deal in real estate in town and country, a contract to pay real-estate agents for effecting an exchange of the corporate property (Minnesota land) for Chicago real estate was not *ultra vires*. *McElroy v. Minnesota P. H. Co.* 317

16. A corporation cannot invoke the doctrine of *ultra vires* to prevent a recovery on a contract which has been fully performed by the other party thereto. *Ibid.*

17. By an agreement for the sale of stock in a corporation the purchaser, H., was to make payment in goods of certain kinds to be manufactured by the corporation. Delivery of the goods was guaranteed by the corporation, and performance of the contract both by H. and by the corporation was guaranteed by S. In an action against S. on his guaranty, *held*, that he could not question the power of the corporation to make the contract. *Hubbard v. Haley*, 578

Power of officers: Estoppel.

18. The contract of guaranty by the corporation in such case was executed by H. as president, but it appeared that the officers and directors knew of the making thereof at the time it was made or soon thereafter; that the corporation through its officers recognized its validity and made payments thereon after H. severed his connection with the organization; and that the corporation was beneficially interested in the consideration. *Held*, that the corporation was estopped to deny H.'s authority. *Ibid.*

19. In an action against a corporation upon a contract to pay agents for effecting an exchange of real estate, executed in the name of the corporation by its president, want of authority on the part of the latter to make the contract was set up as a defense. It appeared that practically all the stock was owned by the president, a few shares being nominally held by relatives and employees, who made up the board of directors, for the purpose of keeping up the corporate organization; that for five years the affairs of the corporation had been conducted by the then president or his predecessor without any objections or proceedings whatever by the stockholders or directors, so far as appeared from the records; that during such time no meeting of either body had been held except one for filling vacancies in the board of directors; and that for over two years negotiations had been pending with the plaintiffs concerning the subject matter of the contract, which had been conducted by the president as substantially the only person interested. *Held*, that the corporation was estopped to deny the president's authority. *McElroy v. Minnesota P. H. Co.* 317

20. Where the president of a corporation is apparently clothed with full power to conduct its business and control its affairs, the public may rely upon such apparent authority, and the corporation will be bound to the same extent as though his acts were specially authorized by a duly-recorded vote of the board of directors, especially where such officer is the owner of substantially all the stock and the only person pecuniarily interested in the corporation. *Senour Mfg. Co. v. Clarke,* 469

Debts: Preferences: Personal liability of stockholders. See BANKS AND BANKING, 2, 3. COURTS, 2, 3.

21. One of the stockholders of a corporation which never became legally authorized to do business paid laborers' claims for work done for the corporation immediately prior to the appointment of a receiver. *Held,* that he was not entitled to a preference under sec. 2787*a*, S. & B. Ann. Stats., since he was personally liable for the debts of the corporation under sec. 1773, R. S. *J. A. Fay & Egan Co. v. Brown,* 434

22. To enforce the statutory liability of stockholders of a corporation for its debts it is not necessary first to proceed under secs. 3216–3222, R. S., to sequestrate the property of the corporation and forfeit its franchise; but the action may be brought under secs. 3223, 3224, and the complaint therein need not allege a prior judgment against the corporation or that its assets have been exhausted, although, before judgment against the stockholders, the insufficiency of the assets and the necessity of a resort to the stockholders' liability should be made to appear. Expressions to the contrary in *Cleveland v. Burnham,* 55 Wis. 598, and *Cleveland v. Burnham,* 64 Wis. 347, disapproved. *Booth v. Dear,* 516

Fraudulent conveyances by corporation. See ATTACHMENT, 1.

Garnishment of foreign corporation. See GARNISHMENT.

Exemption from taxation: "Benevolent association." See TAXATION, 9, 10.

COSTS.

See CRIMINAL LAW, 10. DEEDS, 6. TAXATION, 3. WILLS, 6–8.

1. The taxation of costs will not be disturbed on appeal because of the inclusion of certain items claimed to have been incurred in establishing liability on alleged assigned claims which the appellate court holds not assignable, where substantially all such evidence was proper to establish plaintiff's own original claim upon which it recovers. *John V. Farwell Co. v. Wolf,* 10

2. Interest upon the amount of a recovery, though added to the costs under sec. 2922, R. S., forms no part of the costs; and where, on reversal of a judgment in his favor, plaintiff is authorized to take judgment for a smaller amount with the costs theretofore taxed, such judgment should include interest only upon the amount so authorized. *Ibid.*

COUNTERCLAIM. See PLEADING, 1.

COUNTIES.

1. Under sec. 2604, R. S., a taxpayer, property owner, and voter in a county, regardless of the amount of taxes paid, may maintain an action on behalf of himself and all other taxpayers of the county

to restrain the illegal payment of money by the county and its officers. *Frederick v. Douglas Co.* 411

2. Where a county has a duly qualified and acting district attorney, the board of supervisors has no authority to employ another attorney to take charge of and conduct in the circuit court for that county tax litigation in which the county is interested, the district attorney being a constitutional officer, elected by the people and charged by sec. 752, S. & B. Ann. Stats., with the prosecution and defense of all actions or proceedings in that court in which the county is interested as a party. *Ibid.*

3. The mere fact that public officers have voluntarily and with knowledge of the facts paid out money for services actually rendered in pursuance of an illegal and unwarranted contract will not prevent a recovery thereof in a proper action brought on behalf of the public. CASSODAY, C. J., dissents. *Ibid.*

4. In an action brought by a taxpayer on behalf of all persons interested to restrain payment of an attorney illegally employed by a county board of supervisors to defend tax litigation against the county, and to recover back money already paid to such attorney, it appeared, among other things, that the attorney's employment became a matter of public notoriety within a short time after it was made; that both he and the county board acted in entire good faith; that he performed large and valuable services running through several months; that he had fully earned all the money which had been paid him; and that during all such time the plaintiff and his fellow taxpayers remained silent and allowed the services to be rendered and the money paid without objection. *Held*, that under all the circumstances a court of equity would not require the attorney to return the money. *Ibid.*

5. A county is not liable for the value of a horse which had been taken from its owner by the sheriff while in pursuit of a felon for whose arrest he had a warrant, and had been overdriven and injured in the pursuit. *Randles v. Waukesha Co.* 629

COUNTY COURTS. See COURTS.

COURT AND JURY.

See AGENCY, 1, 2. INSTRUCTIONS TO JURY. MASTER AND SERVANT, 6, 7, 9. RAILROADS, 11, 15–18. VENDOR AND PURCHASER, 3. WILLS, 3.

The court is not warranted in taking a case from the jury unless the facts are undisputed, and the reasonable inferences therefrom in regard to the ultimate fact at issue are all one way. *Morrison v. Madison,* 452

COURTS.

See INSURANCE, 3. LIENS, 10–14.

1. The power of the legislature to take away the jurisdiction of the circuit court in legal or equitable actions is not absolute, but is subject to the condition that a substantial remedy must be conferred on some tribunal of competent and adequate jurisdiction. *Lannon v. Hackett*, 49 Wis. 261, limited and explained. *Gianella v. Bigelow,* 185

2. The power of county courts to enforce the statutory liability of stockholders of a bank against the estate of a deceased stockholder

in the regular course of administration is inadequate since they have no authority to bring in the bank or the other stockholders whose presence is necessary to a complete determination of the liability. The jurisdiction of the circuit court over such proceedings was therefore not taken away by sec. 3845, R. S., conferring exclusive jurisdiction over the administration of estates upon the county court: nor would a recovery therein be barred because the action was commenced after the expiration of the time for the presentation of claims in the county court under sec. 3844. *Ibid.*

3. After the amount of the claim in such a case has been established in the circuit court, no execution can be awarded on the judgment, but the judgment must be certified to the county court to the end that the claim established by it be paid as a claim against the estate in the order prescribed by law. *Ibid.*

CRIMINAL LAW AND PRACTICE.

See ACTION, 2. GAMBLING. MUNICIPAL CORPORATIONS, 8.

1. Although a certificate of deposit is issued for money received by a bank, providing that it shall be payable one year after date with interest and shall not be subject to check, the money is nevertheless received "on deposit," within the meaning of sec. 4541, R. S., making it an offense for any officer of a bank to accept or receive money on deposit when he knows, or has good reason to know, that the bank is unsafe or insolvent. *State v. Shove,* 1

2. The mere fact that a portion of the deposit in such a case consisted of a prior certificate held against the same bank, which was surrendered at the time, did not make the transaction essentially different from what it would have been had the whole amount been deposited in cash. *Ibid.*

3. To prove the insolvency of a bank at the time of receiving a deposit it was proper to show the amount of deposits in the bank, including those for which time certificates not yet due had been issued, and to show, also, the other indebtedness of debtors of the bank, and the value of their commercial paper held by the bank as part of its assets. *Ibid.*

4. In a prosecution for the larceny of a bank draft, a letter purporting to have been written by the cashier of the bank which issued the draft (who was not present at the trial) to the payee, tending, perhaps, to raise a doubt as to the genuineness of the latter's indorsement of the draft, was inadmissible; and its admission constituted a prejudicial error whether the matter contained therein was material or not. *Roby v. State,* 667

5. Where an unverified plea in abatement is returned as a part of the record, and there is nothing to show that it was ever brought to the attention of the court or ruled upon, it will be presumed that the court refused to receive the plea because not properly proven as required by sec. 4647, R. S. *Ibid.*

6. Where a person has prosecuted a writ of error while serving his sentence, the fact that his sentence expired before the decision of his case does not affect his right to a reversal of the judgment, if erroneous. *Ibid.*

7. Sec. 4597, R. S. (providing for the punishment of any one who wilfully interrupts or molests "any assembly or meeting of people,

for religious worship or for other purposes, lawfully and peaceably assembled"), is not confined to religious meetings or assemblies, but includes all lawful meetings of the people. *Von Rueden v. State,* 671

8. The complaint in a prosecution under sec. 4597, R. S., need not allege the special facts showing the purpose or character of the meeting, an averment in the language of the statute that the meeting was lawfully and peaceably assembled being sufficient. *Ibid.*

9. The defendant in a criminal prosecution who has been discharged on his own motion on the ground of the insufficiency of the complaint has not been put in jeopardy; and such discharge is no bar to a prosecution for the same offense upon another complaint. *Ibid.*

10. Where several defendants are tried together for the same offense, a sentence that each pay a certain fine, and the costs, taxed at a gross sum, is not erroneous, each defendant being liable for the entire costs. *Ibid.*

CUSTOM. See RAILROADS, 18.

DAMAGES.

See CONTRACTS, 5. HIGHWAYS, 1. INSTRUCTIONS TO JURY, 5. LIBEL, 4. PLEADING, 2. SALE OF CHATTELS, 2.

1. In an action to recover damages for a conspiracy to defraud by purchasing and disposing of goods without paying for them the measure of damages is the value of the goods at the place where and the time when they were obtained, with interest from that time; but an instruction in such a case that the purchase price, with interest from the commencement of the action, was the measure of plaintiff's recovery was not an error prejudicial to defendants, where it appeared beyond dispute that the goods were worth the purchase price. *John V. Farwell Co. v. Wolf,* 10

[2. Whether the owner of wool which had been loaded in cars for shipment under an agreement that an extra price was to be paid if the wool was delivered within a specified time can recover for the loss of such extra price from a person who, by wrongfully attaching the wool as the property of the consignee, prevented its delivery within said time, not determined.] *Swan v. Porter,* 34

DEBTOR AND CREDITOR.

See ATTACHMENT. CORPORATIONS, 21, 22. FIXTURES, 1. GARNISHMENT. GUARANTY. LIENS. MALICIOUS PROSECUTION. MORTGAGES. PROCESS. VOLUNTARY ASSIGNMENT.

1. G. purchased land with P.'s money, took title in his own name with P.'s consent, and gave P. written declarations that P. owned the land and that he held the title in trust for him, but such declarations were not recorded, and most of them were not entitled to record. Plaintiffs extended credit to G., knowing that he had title to the land but not relying on his ownership thereof. Neither G. nor P. represented that G. owned the lands, nor did P. know that G. was contracting debts. G. conveyed the lands to P., who throughout the entire transaction acted in good faith and without intent to defraud plaintiff or any other person. Subsequently plaintiffs obtained judgment against G. *Held,* that the land could not be subjected to the lien of the judgment by a creditors' action. *Strong v. Gordon,* 476

2. Sec. 2090, R. S. (providing that when an express trust is not created by the conveyance to the trustees "such conveyance shall be deemed absolute as against subsequent creditors not having notice of the trust," etc.), applies only to the express trusts authorized by sec. 2081, S. & B. Ann. Stats., not to mere passive or dry trusts. *Ibid.*

3. In an action by a married woman to remove, as a cloud upon her title to land which had been conveyed to her by her husband, an execution levied thereon under a judgment against the latter upon the theory that his conveyance to his wife had been made with intent to hinder, delay, or defraud his creditors, a finding that the plaintiff was the *bona fide* owner of the land is *held* not to be against the clear preponderance of the evidence. *Clarke v. German Bank,* 552

DEEDS.

See CONTRACTS. 3. DEBTOR AND CREDITOR, 2. EQUITY. FIXTURES. RECORDING ACTS. TAX TITLES, 6. VENDOR AND PURCHASER.

1. A deed purporting to convey to trustees the legal title to land, to hold such title and thereafter to make conveyances thereof upon various contingencies specified, created a passive or dry trust, and not an express trust as defined and authorized by sec. 2081, S. & B. Ann. Stats.; and hence, under secs. 2073, 2075, such deed will be treated as if the grants were in direct terms to the beneficiaries. *Tyson v. Tyson,* 59

2. A deed reserving a life estate in the grantor, and granting a life estate thereafter to his daughter then living, with contingent remainder to the heirs of her body yet to be born (or such of them as she should appoint by will), did not suspend the absolute power of alienation for a longer period than during the continuance of two lives in being at the creation of the estate, within the meaning of sec. 2039, R. S., since the estate of the heirs of the body of the daughter must vest in possession, if at all, at the close of her life. *Ibid.*

3. A further provision of the deed, attempting to grant estates to take effect in the event of the failure of issue in the daughter, did not, even if void, affect the validity of the contingent remainder to her children. *Ibid.*

4. The owner of a block in a village sold lots 1, 2, 7, and 8, and the north half of lots 3 and 6, but by mistake the conveyance described the premises, with reference to a wrongly numbered copy of the plat, as lots 1, 2, 3, and 8, and the north half of lots 4 and 7. Subsequently he sold the remainder of the block to another purchaser, describing it as lots 5 and 6 and the south half of lots 4 and 7, instead of lots 4 and 5, and the south half of lots 3 and 6. The purchasers respectively went into possession of the premises supposed to have been purchased, and subsequently sold them, using the same descriptions as had been employed in their grantor's deed. *Held,* that a purchaser of the first tract who received his conveyance without knowledge of the mistake in the description might maintain an action in equity against a purchaser of the other tract, who took title with knowledge of such mistake, to compel the execution of the necessary conveyances to remedy the error. *Ingles v. Merriman,* 400

5. The defendant in such case by purchasing a tax deed on the south half of lots 4 and 7, with knowledge of the error in the convey-

ances and tax proceedings, acquired no additional rights therein, even though such purchase was made before she received her conveyance of the fee. *Ibid.*

6. Where the plaintiff in an action for the reformation of a deed recovered a judgment compelling an exchange of conveyances between the parties to correct the errors complained of, it was not an abuse of discretion to refuse costs to her because she had not tendered her deed before commencing the action. *Ibid.*

7. Under a deed expressing a consideration of $2,500, and containing a covenant that the premises are free from all incumbrances whatever, except the cost of street improvements in front of the same, "which costs or assessments therefor the second party agrees to pay," the grantee is clearly liable for the entire cost of the improvement in front of the premises, and parol evidence that at the time of the bargain it was represented that such cost would not exceed a certain sum, is inadmissible. *Powers v. Spaulding,* 487

8. Where the grantor in such a case had been compelled to pay the entire cost of the improvement, errors in his estimate of the cost of the same will not estop him from recovering from the grantee more than such estimate. *Ibid.*

DEFAULT: Notice. See GUARANTY, 2.

DEFINITIONS. See WORDS AND PHRASES.

DELAY. See APPEAL, 7. TENANTS IN COMMON, 2.

DEMAND. See GUARANTY, 1.

DISCRETION. See DEEDS, 6. MANDAMUS. VERDICT, 1.

DISTRICT ATTORNEY. See COUNTIES, 2, 4.

DIVISION of estate. See DIVORCE, 2.

DIVORCE.

1. In an action for a divorce, evidence showing, among other things, that the husband lived and slept in the same house with his wife, and ate at the same table food prepared by her, without speaking to her except in anger for a period of three months, is *held* sufficient to warrant the granting of a decree on the ground of cruel and inhuman treatment. *Reinhard v. Reinhard,* 555

2. A mere conclusion of the trial court, in a divorce action, to make a final division of the property of the husband, and a reference to take proofs and recommend a proper division, do not constitute a final division within the meaning of sec. 2369, R. S., prohibiting the making of other provisions for the wife in the future when the property has been finally divided. *Ibid.*

DURESS of goods. See LANDLORD AND TENANT, 3.

EASEMENTS. See WATERS, 1–3.

ENTIRE CONTRACT. See CONTRACTS, 4. LIENS, 12.

EQUITY.

See ACTION, 3, 4. CORPORATIONS, 6. COUNTIES, 1, 4. COURTS. DEBTOR AND CREDITOR. DEEDS, 1, 4–6. DIVORCE. MORTGAGES. PARTNERSHIP. TENANTS IN COMMON, 2. VENDOR AND PURCHASER, 3. WILLS, 3.

1. Where a man eighty-eight years of age, nearly blind, and feeble in mind and body, conveyed away his farm which constituted all his

property for much less than its real value, without making provision for his own support, and his daughter and her husband, with whom he lived, participated in the transaction and received a large part of the proceeds to the exclusion of other children, who had claims on his bounty and were not notified of the proposed sale, it will be presumed that the transaction was fraudulent, and equitable relief will be granted unless such presumption is rebutted, even though the evidence is insufficient to establish actual fraud. *Cole v. Getzinger*, 559

2. In an action by the defrauded heirs to set aside such a conveyance the grantor was not shown to have taken part in the negotiations, or to have ever authorized them or known anything about them until the notary came to execute the conveyance. Letters written to and by the son-in-law and claimed to be an important part of the negotiations had come into possession of one of the defendants who had acted as agent for the purchasers, but he had failed to produce them in response to a subpœna *duces tecum*. It was not shown that the grantor had been informed of the contents of such letters, or that he had directed anything to be written in reply. The notary who drew up the papers knew nothing about the negotiations or the bargain, and his testimony did not show that the transaction was fair and free from undue influence. *Held*, that the presumption of fraud arising from the nature of the transaction and the relation of the parties had been strengthened rather than rebutted. *Ibid.*

3. A court of equity, having obtained jurisdiction in a suit by the defrauded heirs to set aside such a conveyance, will not dismiss the action because the specific relief asked has become impracticable and the only alternative relief possible is mere compensatory damages, but will retain and decide it and decree the payment of such damages. *Ibid.*

4. One of the heirs, who had been made a defendant and had answered admitting the truth of the complaint and claiming the same relief as the plaintiffs, will be regarded as a plaintiff and given relief as such. *Ibid.*

5. R., who had undertaken to purchase land for G., obtained a conveyance thereof to a third person for $3,000, through fraud and undue influence, and immediately caused it to be conveyed to G. for $4,200, R. retaining the difference. *Held*, that G. was not chargeable with constructive notice of the fraud, since R.'s relation to the subject matter was such as would induce him to withhold the facts from G. G. was, therefore, a *bona fide* purchaser, and the conveyance to him could not be set aside. *Ibid.*

ESTATES OF DECEDENTS. See BANKS AND BANKING, 2. COURTS, 2, 3. PARTNERSHIP. WILLS.

ESTOPPEL. See BOUNDARIES, 2. CORPORATIONS, 18–20. DEEDS, 8.

EVIDENCE.

See AGENCY, 2. BOUNDARIES. CRIMINAL LAW, 3, 4. DEEDS, 7. GAMBLING, 2. INSTRUCTIONS TO JURY. INSURANCE, 10–14. LIENS, 4. MALICIOUS PROSECUTION. RAILROADS, 5. TAXATION, 8 (3, 4). WILLS, 1, 4, 5.

1. On the trial of an appeal from a judgment rendered by a justice of the peace, the justice's minutes of the testimony of the plaintiff, since deceased, as a witness are not competent to prove such tes-

timony, but the justice is a competent witness for that purpose, and may refer to such minutes to refresh his recollection. *McGeoch v. Carlson*, 138

2. In such a case the exact words of the deceased need not be given in order to render evidence of his testimony admissible. *Ibid.*

EXECUTION of written instrument: Pleading. See CORPORATIONS, 10.

EXECUTIONS. See COURTS, 3. PROCESS.

EXECUTORS AND ADMINISTRATORS. See BANKS AND BANKING, 2. COURTS, 2, 3. PARTNERSHIP. WILLS.

EXEMPTIONS. See TAXATION, 9, 10.

EXPERT TESTIMONY. See LIENS, 4. WILLS, 4.

EXPULSION of pupil. See PUBLIC SCHOOLS.

FELLOW-SERVANTS. See RAILROADS, 20.

FENCES. See BOUNDARIES. RAILROADS, 3.

FILING of certificate of organization, etc. See CORPORATIONS, 1, 2.

FINDINGS of fact. See APPEAL, 10, 11. VENDOR AND PURCHASER, 8.

FIRE INSURANCE. See INSURANCE, 12–19.

FIRES negligently set. See RAILROADS, 4, 5.

FISHING. See WATERS, 5.

FIXTURES.

1. Where the engines, boilers, and other fixed machinery constituting the equipment of a factory and being a part of the realty had passed as such to a corporation, subject to a mortgage which it had agreed to assume as consideration for the conveyance, the unexplained action of the corporation in taking up such mortgage and giving in lieu thereof a new note secured by mortgage of the same real estate and also by a chattel mortgage of all said fixed machinery did not operate *per se* to impress upon such property the character of personal estate, as between the mortgagee and a general creditor of the mortgagor. *Homestead Land Co. v. Becker*, 206

2. By a written contract the stockholders of a corporation owning a candy factory agreed to separate the business from the real estate, and in pursuance thereof the real estate was conveyed to one of them, who, at the same time, executed a lease to the others reciting that it was expressly understood and agreed by the respective parties that the machinery in the building "belongs to the said lessees absolutely, with the full privilege of removal." *Held*, that the machinery which would otherwise have been a part of the realty was thereby, as between the parties, converted into personal property, and conveyed to the lessees as such. *Keefe v. Furlong*, 219

FORECLOSURE. See MORTGAGES, 1, 3.

FOREIGN INSURANCE COMPANIES. See GARNISHMENT.

FRAUD. See ACTION, 1. ATTACHMENT, 1. CORPORATIONS, 3–6. DEBTOR AND CREDITOR. EQUITY. INSTRUCTIONS TO JURY, 3, 4. INSURANCE, 16, 17. TENANTS IN COMMON.

FRAUDS, STATUTE OF. See SALE OF CHATTELS, 1.

FRAUDULENT CONVEYANCES. See AGENCY, 5. ATTACHMENT, 1. DEBTOR AND CREDITOR. VOLUNTARY ASSIGNMENT, 2.

GAMBLING.

See MUNICIPAL CORPORATIONS, 8.

1. A municipal ordinance providing that if any person shall make oath before the police court that "he suspects and believes, or has good reason to suspect and believe, that any house or other building, room or place is used as and for a gaming house, room or place, for the purpose of gambling . . . and that persons resort thereto for that purpose," the court, "whether the names of the persons last mentioned are known to the complainant or not," shall issue a warrant commanding the officer executing it "to enter such house, building, room or place, and to arrest the keeper thereof and all persons found gambling," and "all persons there found whether playing, gaming, or otherwise," and to take possession of all gambling implements and devices, etc.—is *held*, in respect to the keeper of such a house, not to be in violation of sec. 11, art. I, Const., forbidding unreasonable searches and seizures and providing that no warrant shall issue but upon probable cause and particularly describing the place to be searched and the persons or things to be seized. *State ex rel. Milwaukee v. Newman*, 258

2. A provision in such ordinance that it shall be sufficient to sustain a conviction of a person charged with being the keeper of a gambling house to show that when arrested he was in charge of the building and that gambling implements were at that time found therein, is an independent one and, if void, does not invalidate the other portions of the ordinance. *Ibid.*

3. The return of a search warrant which is the basis of the prosecution under a municipal ordinance of a person arrested under the warrant as the keeper of a gambling house, must state with clearness and certainty the facts authorizing the arrest under the ordinance. *Ibid.*

4. A person arrested while violating a city ordinance against gambling, under a search warrant not naming him and issued upon an affidavit making no direct charge against him, cannot, after being brought before the court, be detained on such warrant alone, pending an adjournment of the case for trial; but a complaint in due form should be lodged against him and process thereon issued for his detention. *Ibid.*

GARNISHMENT.

A foreign insurance company doing business in this state cannot be garnished here by a resident of the state on account of its indebtedness to a nonresident principal defendant arising from a loss occurring in another state, where, under subd. 11, sec. 2637, S. & B. Ann. Stats., the principal defendant could not maintain, in this state, an action upon his claim against the insurance company; and the voluntary appearance of the principal defendant in the main action does not give jurisdiction in the garnishment proceeding. *Mórawetz v. Sun Insurance Office*, 175

GUARANTY.

See CORPORATIONS, 10, 14, 17, 18.

1. Denial of all liability under an agreement to deliver annually for three years a certain quantity of manufactured goods to be se-

lected rendered unnecessary a demand for the goods, specifying kinds and prices, as they became due, as a condition of charging a guarantor of performance. *Hubbard v. Haley*, 578

2. No notice of the default of an original promisor is necessary to render liable a guarantor of payment or performance; the latter's promise being an absolute, not a conditional one. *Ibid.*

GUARDIAN AD LITEM. See APPEAL, 6.

HIGHWAYS.

See MUNICIPAL CORPORATIONS, 10. NEGLIGENCE. RAILROADS, 16.

1. A private individual does not receive such special injury from the unlawful obstruction of a highway, merely because he does not have any other practicable route by which he can reach his land, as will entitle him to recover therefor from the person responsible for the obstruction. *Baier v. Schermerhorn*, 372

2. A town is not liable for injuries caused by a defective highway to the driver of a runaway team, where at the time of the accident the horses were more than momentarily beyond control, and their fright had not been caused by any defect in the highway. *Schillinger v. Verona*, 456

HOSPITALS. See TAXATION, 9, 10.

HUNTING AND FISHING. See WATERS, 5.

HUSBAND AND WIFE. See ATTACHMENT, 2. DEBTOR AND CREDITOR, 3. WILLS, 1, 2.

INFANTS. See MASTER AND SERVANT, 6, 8, 9. RAILROADS, 8.

INJUNCTION. See APPEAL, 2. COUNTIES, 1.

INSANITY. See WILLS, 4.

INSOLVENCY. See CORPORATIONS, 21, 22. CRIMINAL LAW, 1-3. VENDOR AND PURCHASER, 1. VOLUNTARY ASSIGNMENT.

INSTRUCTIONS TO JURY.

See DAMAGES, 1. INSURANCE, 5, 15. RAILROADS, 15.

1. A charge that the jury are not at liberty to reject the testimony of any witness because his statements are in conflict with those of any other witness, is *held* erroneous because it may well have been understood in a sense which would make it an invasion of the province of the jury. *F. Dohmen Co. v. Niagara F. Ins. Co.* 88

2. A charge that if the jury concluded that any witness knowingly and wilfully testified falsely upon any material point they were at liberty to reject all his testimony unless he was corroborated by the statements of other credible witnesses, is erroneous, since such corroboration may be by any credible evidence or facts and circumstances that may fairly be inferred therefrom. *Ibid.*

3. A charge that fraud may be shown by proving circumstances from the existence of which fraud is the natural and irresistible inference, and that if the case made out is consistent with fair dealing and honesty the charge of fraud fails, is erroneous in a civil action as practically requiring the fraud to be shown beyond a reasonable doubt. *Ibid.*

4. A charge that fraud will never be presumed from mere obscurity or apparent error, nor from incorrectness of a person's express estimate of the value of his property although that estimate may have been found incorrect, is an invasion of the province of the jury. *Ibid.*

5. Confusion in the statements of the trial judge in his charge to the jury concerning the measure of damages will not work a reversal, where the verdict clearly shows that the jury were not misled thereby. *Hand v. Agen,* 493

6. Instructions admonishing the jury that they should not come to too positive a conclusion until they had discussed the matter, one with another; and that they should revolve the matters in their minds until 9 o'clock the next morning, but not become set on it until they had heard the discussion from the brethren in the jury room, which they would find perhaps more valuable than any other discussion they had heard,—do not constitute material error. *Ibid.*

INSURANCE.

Accident.

1. By the manual for agents of an accident insurance company bakers were divided into two classes, "baker, proprietor, not working" being in class AA, and "baker, working shop or driving wagon," in class C. The home officers, however, were not absolutely bound by such classification, but might modify the same to suit the exigencies of particular cases. The company issued to an applicant, who stated that he was a "bakery and confectionery proprietor," "supervising," and worked for himself, a certificate insuring him as a "bakery and confectionery proprietor" under class AA. *Held,* that the company had made an exceptional classification and rated the risk as AA. *Schmidt v. Am. Mut. Acc. Asso.* 304

2. The acts of the insured in such case in not only indicating how the work should be done but actually taking hold and assisting therein when necessary or convenient would not constitute a substantial change of occupation, since the word "supervising," as used in the application, means taking part in the work. *Ibid.*

3. A provision in a mutual accident insurance policy requiring all questions between the association and the assured to be, at its option, settled by arbitration, thereby ousting the courts of jurisdiction over every part of the subject of liability and the amount thereof as well, is void as against public policy. *Fox v. Masons' Fraternal Acc. Asso.* 390

4. The fact that at the time of his injury the insured was superintending a small portable sawmill temporarily located in the woods for the purpose of cutting logs into lumber for use in a planing mill owned by him, does not, as matter of law, make his occupation other than that of a "mill owner, overseeing only," or place him in the classification including the more hazardous occupation of a "lumberman in the woods." *Ibid.*

5. Where several questions were submitted to the jury for special verdict in an action on an accident insurance policy, each seeking to determine by an affirmative or negative answer whether the assured at the time of the accident was engaged in a separate and distinct occupation, it was not error to instruct the jury that if they answered any one of the questions in the affirmative they must necessarily answer the others in the negative. *Ibid.*

6. Where an accident insurance policy provided that "if the assured is injured in any occupation or exposure classified by the association as more hazardous than that here given, his insurance and weekly indemnity shall only be so much as the premiums paid by him will purchase at the rates fixed for such increased hazard," and the scheme of insurance classified occupations and not acts and exposures, a particular exposure, though not in pursuit of and as a part of the business or occupation mentioned in the certificate, is not material to affect the liability of the insurer. *Ibid.*

7. Under a contract of accident insurance locating the policy holder in a particular class and specifying as nearly as practicable his actual occupation, a provision that, in case of change of occupation to one more hazardous than that named, the insured should be entitled to recover only such an amount as the premium paid by him would purchase at the rates fixed for the increased hazard, is self-executing, no change in the certificate itself being necessary to effect a reduction of the amount of insurance. *Ibid.*

8. Thus, a letter from the insured to the company notifying it of a change of occupation, and the reply of the company that the classification of the insured had been reduced from class 2 to class 3, as effectually modified the contract as if the change had been written into the certificate. *Ibid.*

9. Under an accident insurance policy exempting the insurer from liability for "intentional injuries inflicted by the insured or any other person," there can be no recovery if the injury was intentional as to the person inflicting it, although accidental as to the insured in that he did not anticipate or expect it. *Button v. Am. Mut. Acc. Asso.* 92 Wis. 83, distinguished. *Butero v. Travelers' Acc. Ins. Co.* 536

10. To defeat a recovery under such a policy it is only necessary that the evidence of intentional killing preponderate against the presumption of accident. *Ibid.*

11. In an action to recover under such a policy, the evidence — showing, among other things, that the insured was a coal-heaver in the employ of a railroad company; that he was killed about 11 o'clock on a dark, stormy night while at work with one companion in a shed lighted by two lamps; that his death was caused by a pistol bullet in the brain; that the first shot was followed by two others each of which inflicted a mortal wound; that the shots could have proceeded only from the open side of the shed; and that when one of the shots was fired the weapon was so near his body as to discolor his clothing with the powder,— is *held* to establish with reasonable certainty that the insured was murdered, and that the murderer knew his victim and fired with intent to kill him. *Ibid.*

Fire. See LANDLORD AND TENANT, 3, 4.

12. The amount of stock on hand in a wholesale mercantile establishment at the time of a fire cannot be shown by testimony as to the contents of the account books showing the purchases and sales since the last inventory, where the witness testifying thereto did not keep the books, and their correctness is not verified in any way, and the books themselves are not in evidence. *F. Dohmen Co. v. Niagara Fire Ins. Co.* 38

13. But where, in such a case, no other definite evidence exists, if the books are reasonably verified as correct records of the daily transactions in the business as the same were regularly reported to the office to be recorded in such books, with proof that the books

were relied upon by the proprietors solely as a repository of the facts in regard to the business, and that they were uniformly found to be correctly kept, a witness who has had occasion to refer to them from time to time, and who thereby and through a general knowledge of the business has been convinced of their correctness, may properly testify, by their aid, to their contents as facts, without having personal knowledge of such facts independently of the books, and without ever having had any other knowledge of all the individual transactions than such as might be gained by generally superintending the business. *Ibid.*

14. The amount of sales made by an insured after a loss, and the amount of the stock at a certain time after the loss, cannot be proven by the insurer by testimony of an adjuster as to what appears on the books of the insured, the books themselves being the best evidence of their contents. *Ibid.*

15. In an action on an insurance policy, where one of the defenses supported by evidence was that plaintiff had destroyed or injured goods, after the fire, to increase the loss, it was error to instruct the jury that whatever damage was done to plaintiff's property was in consequence of the fire. *Ibid.*

16. Where an insurance policy provides that it shall be void in case of any fraud on the part of the insured, such fraud need not have all the elements necessary to sustain an action for deceit; but any trick, artifice, or deception practiced with the object of securing some advantage in the adjustment or payment of a loss, to the prejudice of the insurer, and liable to have that effect, avoids the policy. *Commercial Bank v. Firemen's Ins. Co.* 87 Wis. 297, distinguished and limited. *Ibid.*

17. Where, pursuant to the terms of a policy, it is avoided by fraud of the assured, a claim under the policy for a loss already sustained is forfeited also. *Ibid.*

18. A policy of insurance which covers generally all the household goods of specified classes belonging to the insured on certain premises, but does not mention any particular article as the one to be protected, and which provides that the entire policy shall be void if the interest of the insured be other than sole and unconditional ownership, is not rendered void as to goods to which the insured's title is absolute by the mere fact that his title to one article thus generally described was conditional, the contract of insurance being to that extent divisible. *Cooper v. Insurance Co.* 363

19. Unequivocal notification by the adjuster of an insurance company that, whatever the circumstances of the loss, the company declines to pay it, constitutes, as matter of law, a waiver of proofs of loss under the policy. *Ibid.*

Mutual Benefit Societies.

20. Under a by-law of a mutual benefit society providing that any member failing to pay an assessment within thirty days after notice thereof "shall stand suspended from the order and all benefits therefrom," a failure to pay within such time operates *ipso facto* to suspend the delinquent without any action on the part of the society. *Freckmann v. Supreme Council,* 133

Foreign Insurance Companies. See GARNISHMENT.

INTEREST. See COSTS, 2.

JEOPARDY. See CRIMINAL LAW, 9.

JOINDER.
Of causes of action. See PARTNERSHIP, 2. TAX TITLES, 2.
Of parties. See BANKS AND BANKING, 3. EQUITY, 4. LIBEL, 2.

JUDGMENT.
For deficiency on foreclosure. See MORTGAGES, 1, 3.
Irregularity: Waiver. See APPEAL, 7.
Lien of judgment. See DEBTOR AND CREDITOR, 1.
Modification as to costs: Procedure. See WILLS, 6.
Reversal on appeal, etc. See APPEAL, 10–13. CRIMINAL LAW, 4, 6, 10. DAMAGES, 1. INSTRUCTIONS TO JURY. PRACTICE. RAILROADS, 15, 18. VERDICT, 2. WILLS, 3.

JURISDICTION. See APPEAL, 4. CHANGE OF VENUE, 1. COURTS. GARNISHMENT. JUSTICES' COURTS. LIENS, 10–14.

JURY. See COURT AND JURY. INSTRUCTIONS TO JURY. VERDICT.

JUSTICES' COURTS.

See EVIDENCE.

A notice of appeal from a judgment of a justice of the peace which does not specify the amount of damages or costs recovered, or the aggregate amount thereof, or give the date of the judgment other than the year in which it was rendered, is insufficient under sec. 3754, R. S., to confer jurisdiction on the circuit court. *Clune v. Wright,* 630

LACHES. See TENANTS IN COMMON, 2.

LAKES. See WATERS, 1–5.

LAND CONTRACT. See VENDOR AND PURCHASER.

LANDLORD AND TENANT.

See FIXTURES, 2. LIENS, 5, 6. RECORDING ACTS. WATERS, 3.

1. Where a manufacturer of machinery has equipped a mill for a tenant under a contract, no privity of contract exists between him and the landlord, who also holds a mortgage on the leasehold interest, such as will enable the landlord to insist that there can be no recovery on the contract for want of performance. *J. B. Alfree Mfg. Co. v. Henry,* 327
2. The tenant in such a case, in the absence of fraud or unlawful combination, would not be precluded from waiving strict performance of the contract and adjusting the manufacturer's claim on fair and equitable terms. *Ibid.*
3. Where a lessee, who, in compliance with the terms of the lease, had taken out insurance policies covering the lessors' interest in the premises as well as his own, was so situated after a loss that he must obtain the insurance money at once in order to go on with his business, the refusal of the lessors to execute proofs of loss, or indorse drafts given in payment thereof, unless the lessee would agree to pay them a considerable sum in excess of what was legally due them under the policies, and which the lessee did not owe them, constituted duress of goods; and the lessee may recover back the sum so unjustly exacted. *Guetzkow Brothers Co. v. Breese,* 591

4. By the terms of a lease the lessors were given a lien for their rent upon an engine and boiler which the lessee was to place on the premises, and the lessee was required to keep the buildings and the engine and boiler insured for not less than $6,200. The lessee took out several policies, payable to the lessors and to itself, as their interests might appear. Each thousand dollars of insurance was divided into items covering different classes and pieces of property, the total amount on the main building being $3,333.26, on the boiler house $833.50, and on the engine and boiler $3,333.26. The main building and its contents were totally destroyed. *Held*, that the agreement to insure had been complied with, and that the lessors were entitled only to the amount for which that building had been insured, even though such amount was less than its value. *Ibid.*

LANDS SOLD FOR TAXES. See TAX TITLES.

LEAVE OF COURT. See APPEAL, 6.

LIBEL.

1. A telegram, sent to a clergyman two days after a general election, stating that "the citizens of Wisconsin demonstrated you are an unscrupulous liar," is libelous *per se*. *Monson v. Lathrop*, 386

2. Where a libelous publication is the joint act of two or more persons, they may be sued either jointly or severally at the election of the plaintiff. *Ibid.*

3. The writing of a libelous telegram and its delivery to the company for transmission constitute a publication. *Ibid.*

4. A newspaper article predicting a fresh attack upon the state university at a coming meeting of the state teachers' association, and stating that plaintiff (a teacher, institute conductor, manager of a teachers' agency, and proprietor of an educational journal) and one H. (a normal school president) "are said to have had their heads together," and that plaintiff is known to have "repeatedly written high school teachers asking them to launch attacks upon the university," does not convey a charge of moral turpitude or have relation to plaintiff in any of his occupations, and is not therefore libelous *per se*. *Gillan v. State Journal Ptg. Co.* 460

5. A complaint in such a case, alleging, among other things, that the article was published during the progress of a newspaper controversy relative to the state university in which charges had been made against its management and the character of the work done, engendering hostility on the part of its friends towards the authors of the attack and all who encouraged the same, and just prior to a meeting of the state teachers' association at which the relations of the high schools with the university was to be a topic for discussion, is *held* insufficient to raise a presumption of injury, in the absence of an allegation of special damages. *Ibid.*

LIENS.

Of mechanics, etc., for labor and materials. See CORPORATIONS, 9.

1. After making a proposal for the remodeling of a building a firm of contractors was dissolved, and two days later one of the former members made a contract in his own name for said work. Soon after, the same persons formed a new partnership. The owner of

the building expressly refused to substitute the new firm as a party to the contract, but it contracted for the materials and labor and performed the contract with his knowledge. *Held*, that the firm was the principal contractor, within the meaning of sec. 3315, S. & B. Ann. Stats., and that persons who, dealing with it as such, furnished materials and performed labor on the building were entitled to subcontractors' liens. *Van Horn v. Van Dyke*, 30

2. One having a mechanic's lien upon a building is not a "purchaser in good faith," etc., within the meaning of sec. 2241, R. S., providing that an unrecorded conveyance shall be void as against a subsequent purchaser in good faith and for a valuable consideration whose conveyance is first duly recorded. *Mathwig v. Mann*, 213

3. A mechanic's lien which, by sec. 3314, S. & B. Ann. Stats., is prior to any lien originating subsequent to the commencement of the construction of the building, is not prior to a mortgage executed before, but not recorded until after, such construction was commenced. *Ibid.*

4. In an action to enforce a mechanic's lien, where the amount of materials furnished and the number of days work performed was at issue, the testimony of experts who had examined the premises that so much material as claimed could not have been used for the purpose, according to the plans and specifications for the building, and that the work could fairly have been done in much less time than claimed, was admissible, and a judgment based thereon will not be reversed as against the clear preponderance of the evidence. *McCallan v. Buckstaff*, 316

5. A claim for a mechanic's lien which referred only to the leasehold interest in the premises of the person for whom materials had been furnished cannot be amended after the expiration of the statutory time for filing liens so as to assert in addition a claim upon the distinct and separate estate of the owner of the fee. *J. B. Alfree Mfg. Co. v. Henry*, 327

6. A lease of land for a term of fifty years, which did not contemplate the construction of improvements on the premises but provided only for the payment of a specified yearly rental and the taxes, created the relation of landlord and tenant between the parties, within the meaning of ch. 466, Laws of 1887 (sec. 3314*a*, S. & B. Ann. Stats.), providing that the statutes relating to mechanics' liens shall not be construed as giving a lien where the relation of landlord and tenant exists: and the effect of the statute would not be overcome by the consent of the landlord to the making of improvements. *Ibid.*

7. Where money is loaned and a mortgage executed after the commencement of the construction of a mill and the making of a contract for machinery to be placed therein, the lien of the mortgagor on the debtor's interest in the premises is subsequent to the lien for machinery. *Vilas v. McDonough Mfg. Co.* 91 Wis. 607, followed. *Ibid.*

On logs and lumber.

8. Under sec. 3329, S. & B. Ann. Stats. (providing that a person who performs labor in cutting, felling, hauling, or running logs, or manufacturing them into lumber, etc., shall have a lien upon the logs and the lumber manufactured therefrom), no lien is created upon lumber for work done in driving piles and building docks and tramways for permanent use in connection with the sawmill where it was manufactured. *Kendall v. Hynes L. Co.* 659

9. Under sec. 3331, S. & B. Ann. Stats. (providing that for work done upon logs, etc., between November 1 and May 1 following, the claim for a lien shall be filed on or before June 1 following, and that for work done after May 1 and before November 1, following, or for continuous work from November 1, or a day prior thereto, to and beyond May 1 following, the claim for a lien shall be filed within thirty days after the last day of doing such work) in order to sustain a lien for work done prior to May 1 in any year where the claim was not filed till after June 1 following, it is essential to show that the work commenced on November 1 preceding, or a day prior thereto, and continued without material interruption to within thirty days of the time of such filing. *Ibid.*

Maritime: Jurisdiction of state and federal courts.

10. The owner of a vessel, as a common carrier, has at common law a particular and specific lien for his freight upon goods carried, which may be enforced in a state court. *Warehouse & Builders Supply Co. v. Galvin,* 523

11. An action of replevin, brought by the owner and consignee of goods shipped by water to recover possession thereof from the owner of the vessel and those claiming under him, who claimed a lien thereon growing out of the contract of carriage, is a proceeding to enforce a common-law remedy, and not a proceeding in admiralty. The state courts were not therefore deprived of jurisdiction over the action by sec. 2, art. III, Const. of U. S., or by subd. 8, sec. 563, R. S. of U. S., vesting exclusive admiralty and maritime jurisdiction in the federal courts, but expressly saving to suitors the right of a common-law remedy where the common law is competent to give it. *Ibid.*

12. A contract to carry 5,000 bushels of salt between certain points at ten cents per barrel is an entire contract, and if only a part of that amount is actually delivered for carriage, the carrier is entitled to a lien thereon, at the end of the transit, for the entire contract price. *Ibid.*

13. Where a shipper fails to deliver to a vessel the full amount of goods which he has contracted to furnish, the lien of the vessel upon the goods delivered is enforceable in admiralty, whether the action be regarded as one to recover freight or for damages for the nonperformance of a contract. *Ibid.*

14. Where a person has a lien upon goods which would be enforced by the federal courts as courts of admiralty, the owner of the goods cannot recover them in an action of replevin brought in the state courts. *Ibid.*

LIMITATION OF ACTIONS. See COURTS, 2. PARTNERSHIP, 1. TAX TITLES, 1–3.

LOGS AND LUMBER. See CONTRACTS, 7. LIENS, 8, 9.

MALICIOUS ABUSE OF PROCESS. See PROCESS.

MALICIOUS PROSECUTION.

1. In an action for a malicious prosecution claimed to have been instituted for the purpose of collecting a debt, a letter written to the plaintiff a few days before the issuance of a criminal warrant, by the cashier of a bank in behalf and by authority of defendants, requesting her to pay the account in question at once "and save the trouble of taking other steps to collect it," was admissible in evidence. *Strehlow v. Pettit,* 22

2. In such action the testimony of plaintiff's brother-in-law that an officer having a warrant for her arrest had requested him to inform her of that fact and that she must appear before a justice of the peace at a certain time, and that he had so informed her, was admissible, in connection with other evidence (showing, among other things, that the warrant had been issued, and that she had so appeared), as tending to prove an arrest; and such evidence is *held* sufficient to sustain a finding that the prosecution against the plaintiff was actually commenced and that in pursuance thereof she submitted herself to the jurisdiction of the justice. *Ibid.*

3. Evidence in such case showing, among other things, that when plaintiff appeared before the justice the case was postponed to a certain time; that at that time the plaintiff again appeared, but no one appeared against her, and the justice said there was nothing on his docket; that the warrant was never returned; and that nothing further was ever done in the matter — is *held* sufficient to sustain a finding that the prosecution was terminated before the action therefor was commenced. *Ibid.*

4. It is no defense to an action for malicious prosecution that the complaint made by the prosecutor failed to state any offense and that the warrant issued thereon was void. *Ibid.*

5. The mere fact that a criminal prosecution was instituted for the purpose of collecting a debt will not justify a finding that there was a want of probable cause. *Lueck v. Heisler*, 87 Wis. 644, limited and explained. *Ibid.*

MANDAMUS.

See TAXATION, 5-7.

Although the granting or refusing of a writ of *mandamus* is somewhat discretionary, when it appears that the application is made to enforce a clear legal right; that the duty to be performed is plain and positive; that substantial damage will follow its nonperformance; and that there is no other adequate remedy, no laches chargeable to the applicant, and no special reason which renders a resort to the remedy inequitable, it is an abuse of discretion to refuse the writ. *Neu v. Voege*, 489

MARITIME LIENS. See LIENS, 10-14.

MARRIED WOMEN. See ATTACHMENT, 2. DEBTOR AND CREDITOR, 3. WILLS, 1, 2.

MASTER AND SERVANT.

Contract of employment: Construction: Breach.

1. Where the complaint in an action to recover damages for breach of a contract of employment alleged that the defendant hired the plaintiff "as manager of its business," and the answer admitted that he "agreed to assume charge of and to manage the defendant's business and store," the plaintiff, as matter of law, was something more than a mere manager of a store, and had some discretion as to the manner of the discharge of his duties, including the time and manner of advertising, and the employment of his time; and occasional absences while actually employed in good faith in what he deemed to be the furtherance of the interests of defendant's business would afford no ground for his discharge. *Moody v. Streissguth Clothing Co.* 202

2. The action of an employer in retaining an employee after knowledge of a breach of duty, with an admonition "not to let it happen again," is a condonation of the breach. *Ibid.*

3. In an action for wages, evidence that plaintiff had been employed by defendant "at a salary of $1,500 per annum, to begin June 1, 1889," and that he began work on that date, and continued uninterruptedly in defendant's employ until June 1, 1895, without any new contract, is *held* sufficient to require the submission to the jury of the question whether plaintiff was employed for the entire year ending June 1, 1895, at the rate of $1,500 per annum, although during that year defendant notified him that his salary had been reduced. *Dickinson v. Norwegian Plow Co.* 376

Injuries to servants: Negligence.

4. In an action by a servant to recover for injuries alleged to have been caused by a failure to furnish him a safe place in which to work, a failure to furnish the latest and most approved appliances does not constitute negligence as matter of law, the test of liability being whether the master exercised such care in that regard as men of ordinary care and prudence observe in and about their affairs, or such care as the great mass of men observe under similar circumstances. *Innes v. Milwaukee,* 170

5. Where the only negligence relied on in an action for the killing of a boiler attendant by the bursting of an elbow in a blow-off pipe was the use of a cast-iron elbow, a finding of the special verdict that it was constructed of the materials and in the manner ordinarily and usually employed in the construction of such elbows is inconsistent with findings that there was a defect or insufficiency in it which caused it to give way and burst, and that the defendant was guilty of want of ordinary care which was the proximate cause of the accident. *Ibid.*

6. In an action to recover for injuries received by a boy fifteen years old while engaged in operating a machine in defendant's factory about which he had had more or less experience, the question whether the plaintiff assumed the risks arising from defects in the machine, by continuing in the employment knowing of such defects, is *held* to have been for the jury. *Vorbrich v. Geuder & Paeschke Mfg. Co.* 277

7. Per MARSHALL, PINNEY, and NEWMAN, JJ. Although, in an action for personal injuries alleged to have been caused by the unexpected revolution of a stamping machine, operated by touching a pedal which engaged, by means of a clutch, a wheel on a revolving shaft, the testimony of the plaintiff that the machine made such an unexpected revolution the day before, and also at the time of the accident, and the testimony of another witness that he subsequently saw it do the same thing when there was no one near it, might raise a presumption of negligence as matter of law, such presumption would be overcome by conclusive proof that the machine was free from all discoverable defects. *Ibid.*

8. Unless apprised to the contrary, a master has the right to assume that a boy eighteen years of age is possessed of average intelligence for a person of his years. *Roth v. S. E. Barrett Mfg. Co.* 615

9. A boy of average intelligence, eighteen years of age, who is put at work pushing straw into a straw cutter with a stick, will be presumed, as a matter of law, to know and appreciate the danger of getting his fingers caught in the rolls and being injured thereby, and his evidence to the contrary does not raise a question for the jury. *Ibid.*

MAXIMS.
Noscitur a sociis, 673, 674.
Res ipsa loquitur, 544
MEASURE OF DAMAGES. See DAMAGES.
MECHANICS' LIENS. See LIENS, 1-7.
MILLS AND MILL-DAMS. See WATERS, 1-3.
MILWAUKEE CITY CHARTER. See TAXATION, 1. TAX TITLES, 4, 5.
MINORS. See MASTER AND SERVANT, 6, 8, 9. RAILROADS, 8.
MISTAKE. See DEEDS, 4-6. MORTGAGES, 2. TAXATION, 8.

MORTGAGES.

See CORPORATIONS, 8, 9. FIXTURES, 1. LANDLORD AND TENANT, 1, 2. LIENS, 3, 7. TENANTS IN COMMON, 2.

1. In an action to foreclose a mortgage the rendition of a personal judgment for a deficiency before the deficiency became due by the terms of the contract is a material error. *Packard v. Kinzie Ave. Heights Co.* 114
2. In a proceeding by the wife of a mortgagor to set aside the mortgage so far as it affected her dower and homestead rights in a portion of the land, she testified that she could read English print with difficulty and English script not at all; that she intended to execute the instrument, but that she had been induced by her husband to believe that the mortgage covered his store property only. The mortgage was regular upon its face, and no fraud was charged against the mortgagee. The attorney who took the wife's acknowledgment testified that he either read the mortgage to her, or asked her if she knew its contents, and she had replied that she did, basing his testimony upon the fact that he never took an acknowledgment without doing one or the other. *Held*, that a finding that the wife voluntarily executed the instrument knowing its contents should not be disturbed on appeal. *German Bank v. Muth*, 342
3. In an action to foreclose a second mortgage the owner of the first mortgage did not appear, but upon motion of the plaintiff judgment was rendered directing that the proceeds of the foreclosure sale be applied so far as necessary to pay off the first mortgage. The plaintiff bid in the premises at the sale for less than the amount due on his mortgage. The sheriff paid the net proceeds to him and he retained the same. *Held*, that a deficiency judgment against the mortgagor for the amount due on the first mortgage was erroneous. *Kasson v. Tousey*, 511
4. A mortgage while outstanding as security for the indebtedness evidenced by promissory notes, is not properly subject to conversion to the mortgagor's damage. An answer in an action on the notes which admitted the indebtedness and set up a counterclaim for the conversion of the mortgage was therefore properly stricken out as frivolous. *Wilson v. Burhans*, 550

MUNICIPAL CORPORATIONS.

Aid to railroads: Indebtedness: Constitutional law.

1. The provision of sec. 946, R. S., that the acceptance by a municipality of a proposition for subscription to the stock of a railroad

company and the issuance of bonds in payment thereof may be given by the signatures of a majority of the resident taxpayers, without a submission of the question to the electors, is valid, and such consent when so given creates a contract binding upon the municipality. *State ex rel. M., T. & W. R. Co. v. Tomahawk*, 73

2. Sec. 3, subch. IX, of the charter of the city of Tomahawk (ch. 58, Laws of 1891) provides that "no debt shall be contracted against the city . . . unless the same shall be authorized by a majority of all the members-elect of the common council," and that "the common council shall not, in any case, or under any pretext, or for any purpose whatever, contract debts or liabilities of any kind, name, or nature, exceeding the amount which it is authorized by the charter to levy for the current year." Secs. 12, 15, subch. V, provide that the council shall manage and regulate the finances and levy all taxes. Sec. 11, subch. IV, provides that, in addition to the amount of taxes for general city purposes, special taxes may be levied for certain purposes "of public utility," provided such special taxes shall first have been recommended by the council and afterwards approved by a vote of the people. Sec. 19, subch. XIII, authorizes the council to issue bonds of the city, not to exceed five per cent. of the assessed valuation, for such public improvements as shall be authorized by ordinance of the council adopted by a vote of three fourths of its members, the issuance of such bonds to be approved by a vote of the people. *Held*, that these provisions, construed together, are not at variance with, and do not by implication repeal, the general law relating to municipal aid to railroads (secs. 945 *et seq.*, R. S.),—sec. 3 of subch. IX being applicable only to debts for ordinary municipal purposes, and sec. 19, subch. XIII, being an affirmative provision merely, which does not prevent the city from exchanging its bonds for stock of a railroad company up to the prescribed limit, when a valid contract therefor is made under the general law. *Perrin v. New London*, 67 Wis. 416, distinguished. *Ibid.*

3. Although the amendment to sec. 3, art. XI, Const., limited the amount of indebtedness which a city might incur, yet the power and duty of the legislature remained to impose other restrictions or regulations; but the sufficiency of such restrictions being a question within the discretion of the legislature, its action in the premises is not reviewable by the courts. *Ibid.*

4. Under sec. 948, R. S. (providing that no corporate bonds issued in exchange for railroad stock "shall be delivered, or be valid if delivered," until the road shall have been actually completed and in operation), no indebtedness on the part of the municipality can be said to have been incurred, within the meaning of sec. 3, art. XI, Const. (prohibiting municipalities from becoming indebted in any manner in excess of five per cent. of the value of the taxable property therein, "to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness"), until the road is completed in the prescribed manner. *Ibid.*

5. The assessment intended as the basis of determining whether a municipal indebtedness is in excess of the five per cent. limit imposed by said sec. 3, art. XI, Const., is the last assessment of the municipality as equalized by the local board of review for the purposes of general taxation. *Ibid.*

6. In determining whether a proposed issue of municipal bonds is in excess of the constitutional limit of indebtedness, all forms of indebtedness must be included except warrants for money actually

in the treasury and contracts for ordinary expenses within the current revenue. *Ibid.*

7. Where a city before its incorporation formed part of a school district, no part of the indebtedness of such district should be reckoned as an obligation of the city, in determining whether its constitutional limit of indebtedness has been reached, unless such indebtedness is shown to have been legally apportioned between the city and the district. *Ibid.*

Ordinances: Penalties. See ACTION, 2. GAMBLING.

8. Although an act is a penal offense under the laws of the state, further penalties for its commission may, under proper legislative authority, be imposed by municipal by-laws or ordinances; and the enforcement of the one does not preclude the enforcement of the other. *State ex rel. Milwaukee v. Newman,* 258

Claims: Presentation: Appeal.

9. Under the general law for the incorporation of cities (ch. 326, Laws of 1889, as amended by ch. 312, Laws of 1893), providing, in secs. 58–60, that no action shall be maintained against a city organized thereunder "upon any claim or demand *of any kind or character whatsoever,*" unless it shall have been first presented to the common council and disallowed in whole or in part, and that the action of the council thereon shall be conclusive unless appealed from within twenty days, failure to appeal from the disallowance of a claim for personal injuries within the prescribed time constitutes a bar to an action to recover therefor. *McCue v. Waupun,* 625

Defective streets, etc. See HIGHWAYS, 2.

10. A cross-walk is not defective as matter of law because an apron from the sidewalk across the gutter is constructed, on a slope of one and three-fourths inches to the foot, without cleats or other devices to prevent slipping. *Morrison v. Madison,* 452

MURDER. See INSURANCE, 11.

MUTUAL BENEFIT SOCIETIES. See INSURANCE, 20.

NEGLIGENCE.

See HIGHWAYS, 2. MASTER AND SERVANT, 4–9. MUNICIPAL CORPORATIONS, 10. RAILROADS, 3–20. WATERS, 6–9.

1. If there is a substantial space between the boundaries of a traveled way and a dangerous place on adjoining land, so that to reach such place a traveler must necessarily wander from or pass wholly outside of such way and become a trespasser, the owner of the premises is not liable for injuries to a traveler sustained by reason thereof. *Gorr v. Mittlestaedt,* 296

2. Thus, where a private driveway, twelve feet wide, with well-defined boundaries, is situated over twenty feet from a cellar, the intervening space being occupied by a grass plot and piles of stone extending from the ends of the cellar nearly to the driveway, the owner of the premises is not liable for injuries received by a person traveling on the driveway by invitation, whose horse became unmanageable and caused the carriage to wholly leave the driveway and pass over the grass plot to the cellar. *Ibid.*

NEGOTIABLE INSTRUMENTS. See BANKS AND BANKING, 1. VENDOR AND PURCHASER, 2.

NEW TRIAL. See APPEAL, 1, 9.

NONRESIDENTS. See GARNISHMENT. PUBLIC SCHOOLS, 2.

NOTICE.
Of defects in title. See CORPORATIONS, 8. DEBTOR AND CREDITOR, 1. DEEDS, 5.
Of conveyance. See LIENS, 2. RECORDING ACTS.
Of appeal. See JUSTICES' COURTS.
Of default of original promisor. See GUARANTY, 2.
Of fraud. See EQUITY, 5.
Of fraudulent foreclosure. See TENANTS IN COMMON, 2.
Of insolvency. See VOLUNTARY ASSIGNMENT.

OBSTRUCTION of highway. See HIGHWAYS, 1.

OFFICERS.
Payment of money by public officers: Recovery. See COUNTIES, 3, 4.
Assessors. See TAXATION, 5–7.
Of corporations: Apparent powers: Estoppel. See CORPORATIONS, 18–20.
District attorney. See COUNTIES, 2, 4.
Sheriff. See ATTACHMENT, 2. COUNTIES, 5.

ORDINANCES. See MUNICIPAL CORPORATIONS, 8.

PARTIES. See BANKS AND BANKING, 2, 3. EQUITY, 4. LIBEL, 2.

PARTNERSHIP.

See LIENS, 1.

1. Until there has been an accounting and settlement of partnership affairs one partner can have no claim against the estate of a deceased partner, growing out of the state of the partnership accounts, which is enforceable against the heirs of the latter under sec. 3274, R. S., or which will be barred by sec. 3844 if not seasonably presented to the probate court. *Blakely v. Smock,* 611

2. A cause of action for the settlement of partnership accounts cannot be joined with one to recover from the heirs of a deceased partner the balance found due the plaintiff, since one is purely equitable and the other purely legal, and the parties are not the same. *Ibid.*

PATENTS of land. See TAXATION, 8.

PAYMENT. See COUNTIES, 3, 4.

PERPETUITIES. See DEEDS, 2, 3.

PLACE OF TRIAL. See CHANGE OF VENUE.

PLEADING.

See ACTION, 3, 4. APPEAL, 12, 13. CORPORATIONS, 10, 22. CRIMINAL LAW, 5, 8. GAMBLING, 4. LIBEL, 5. MORTGAGES, 4. RAILROADS, 1, 19. TAXATION, 1, 3. VENDOR AND PURCHASER, 3. WATERS, 9.

1. Under secs. 2655, 2656, R. S. (providing that a defendant may plead as a counterclaim "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action"), the defendant in a civil action for assault and battery may set up as a counterclaim a cause of action for a prior assault committed upon him by the plaintiff, in defending himself from which the defendant committed the assault for which the action was brought. *Pelton v. Powell,* 473

2. Where, in an action for breach of a contract for the delivery of a certain amount of goods annually for three years, to be selected by the plaintiff, the complaint declared merely for successive defaults as the goods became due, and did not allege denial of liability, no recovery could be had for failure to deliver goods not due at the time of the commencement of the action. *Hubbard v. Haley,* 578

PRACTICE.

See ACTION. APPEAL. ATTACHMENT, 3. BANKS AND BANKING, 2, 3. CHANGE OF VENUE. CORPORATIONS, 10, 22. COSTS. COURT AND JURY. COURTS, 3. CRIMINAL LAW. EQUITY, 3, 4. EVIDENCE. GAMBLING, 3, 4. INSTRUCTIONS TO JURY. JUSTICES' COURTS. LIENS, 5, 9. MORTGAGES, 1, 3, 4. PARTNERSHIP. PLEADING. PROCESS. VERDICT. VOLUNTARY ASSIGNMENT, 1. WILLS, 6-8. WRIT *of error.*

Impropriety in the argument of counsel to the jury will not be cured by the mere formal announcement that objection thereto is sustained, but to have that effect the court must at once, and plainly, direct the jury to disregard the objectionable remarks. *Andrews v. C., M. & St. P. R. Co.* 348

PREFERENCES. See CORPORATIONS, 21.

PRESUMPTIONS. See BOUNDARIES, 1. CRIMINAL LAW, 5. EQUITY, 1, 2. INSTRUCTIONS TO JURY, 4. MASTER AND SERVANT, 7-9.

PRIORITY. See LIENS, 2, 3, 7.

PRIVITY of contract. See LANDLORD AND TENANT, 1.

PROCESS.

To sustain an action for malicious abuse of process, the process must have been used to accomplish some unlawful end, or to compel the person against whom it runs to do some collateral thing which he could not legally be compelled to do. Thus, entering judgment on a judgment note after 10 o'clock at night, and immediately levying an execution thereon by forcibly breaking into the debtor's store, with the intent to injure his credit and business reputation, the creditor all the time knowing that the debtor was solvent and ready and willing to pay the note upon demand, does not render the creditor liable to such an action. MARSHALL, J., dissents, being of the opinion that if process to collect a judgment be executed in an unnecessarily harsh and oppressive manner, with a malicious purpose to injure the judgment debtor, such conduct constitutes an actionable wrong. *Docter v. Riedel,* 158

PROMISSORY NOTES. See BANKS AND BANKING, 1. VENDOR AND PURCHASER, 2.

PROMOTERS. See CORPORATIONS, 3-9.

PROOFS OF LOSS. See INSURANCE, 19.

PROXIMATE CAUSE. See HIGHWAYS, 2. RAILROADS, 9, 11, 17.

PUBLIC LANDS. See TAXATION, 8.

PUBLIC POLICY. See INSURANCE, 3.

PUBLIC SCHOOLS.

1. The wrongful exaction of a tuition fee by the teacher and principal of a school as a condition of allowing a pupil to remain in school, and the payment of such fee under protest, are not equivalent to an expulsion of the pupil from the school, where the school board alone has the power of expulsion. *State ex rel. Smith v. Board of Education,* 95

2. Where a child of school age is sent or goes into a school district with the primary purpose of securing a home with a particular family, he is entitled to the benefits of the public schools in that district free of charge; but if his primary purpose in locating therein is to participate in the advantages of the public schools he must pay tuition, even though he has some other incidental purpose to subserve while so attending school. *Ibid.*

PUBLICATION of libel. See LIBEL, 3.

RAILROADS.

Municipal aid. See MUNICIPAL CORPORATIONS, 1-7.

Spur tracks.

1. A complaint in an action against a railway company for failure to operate a spur track to a warehouse under sec. 1802, R. S., which fails to show that the plaintiff constructed or owns the track, does not state a cause of action, the duty of railroad companies to operate such tracks under that section being limited to those provided by the person desiring the service. *Bartlett v. C. & N. W. R. Co.* 335

2. Although a railroad company constructed a spur track in a public street especially for the benefit of the owner of a warehouse, and such track had been improved and graded by him, a promise by the railroad company to continue to operate it for his benefit would be without consideration. *Ibid.*

Fences: Killing of animals.

3. A person in charge of horses, with knowledge of an opening in the fence along a railway right of way, turned them into a pasture not far distant, the fences of which he knew or ought to have known had been partially destroyed by forest fires a short time previous, so that the horses readily escaped and reached said opening. *Held,* that he was guilty of contributory negligence which would preclude recovery for the killing of the horses by a passing train. *McCann v. C., St. P., M. & O. R. Co.* 664

Surface waters: Failure to construct culverts, etc. See WATERS, 6-9.

Fires negligently set.

4. To warrant a recovery for the destruction of property by a fire alleged to have been negligently set, the fire must be identified and traced as the same continuing fire all the way from the place of its origin to the location of the destroyed property, either by witnesses who saw it or by facts and circumstances equally persuasive. *Montague v. M., St. P. & S. S. M. R. Co.* 633

5. Where a witness, who testified on his examination in chief that he saw a fire in section 9 on the 9th of July, and that it went south and was in section 17 on the 23d of that month, admitted on cross-examination that he did not trace the fire from section 9 to section

17, and was not on section 9 between those dates but was miles away most of the time, his testimony, so far as it tended to show that the fire in section 9 on the 9th crossed to section 17, should have been stricken out on motion as mere assumption and conjecture. *Ibid.*

Injuries to passengers.

6. It is the duty of a passenger to ascertain, before boarding a train, whether it stops at his destination, and his failure in that regard imposes no duty upon the company to stop at such station contrary to the published schedule. *Schiffler v. C. & N. W. R. Co.* 141

7. It is not within the apparent power of the conductor of a passenger train to bind the railroad company by any promise to change the published schedule of the train. *Ibid.*

8. A boy of ordinary intelligence, seventeen years old, who had on several occasions made journeys by railroad alone, is *held* to have assumed the risk in jumping from a moving train at a station at which the train was not scheduled to stop, although the conductor had accepted his fare to that station and promised to slow up for him, and the boy thought the promise was being kept and jumped when the train did not appear to be slowing up any more. *Ibid.*

9. The failure to stop the train in such a case was not the proximate cause of injuries received by reason of the jump. *Ibid.*

10. A passenger on a railway train which has been stopped by burning tanks of oil on the track, who, from mere motives of curiosity and pleasure, leaves a place designated as a temporary station at a safe distance from the fire, and goes within eighty-five feet of the fire, and remains there for some time, thereby exposing himself to obvious danger, is guilty of such contributory negligence as will prevent a recovery for injuries caused by an explosion of one of the tanks. *Conroy v. C., St. P., M. & O. R. Co.* 243

11. Findings of the special verdict in such a case that if plaintiff had remained at the temporary station he would not have been seriously injured; that he unnecessarily and from motives of curiosity and pleasure approached much nearer the burning cars; and that his injuries were caused by reason of his so going nearer thereto,—are *held* to be inconsistent with other findings that the defendant in the exercise of ordinary prudence should have known of the plaintiff's position in time to warn him of the danger from the burning car; that it ought to have anticipated that plaintiff would go nearer the car and thus incur such danger; that the warning given plaintiff was negligently and insufficiently given; that plaintiff was not guilty of contributory negligence; that defendant did not exercise reasonable care and prudence in designating a place where plaintiff might take the train; and that its officers and agents were guilty of negligence which was the proximate cause of plaintiff's injuries. No judgment should therefore have been given upon the verdict. *Ibid.*

12. The relation of carrier and passenger is *held* not to have ceased to exist, although the actual transit had been interrupted for the time being by the wreck on the track and plaintiff had voluntarily left the temporary station, to which he had been transferred to await another train, for the purpose of obtaining a nearer view of the wreck. *Ibid.*

13. The danger of an explosion of the burning tank of oil was not hidden or concealed so as to render the railroad company liable for injuries occasioned thereby to an adult who had approached the

wreck from motives of curiosity, without an invitation, express or implied. *Ibid.*

14. The railroad company and its agents were not bound to restrain by physical force a passenger of ordinary intelligence in order to keep him out of such a danger, which was as obvious to him as to them. *Ibid.*

15. The railroad company in such case was bound to the exercise of only ordinary care and prudence to protect the plaintiff from danger, in view of the situation and existing circumstances. It was therefore erroneous to instruct the jury "that it is the duty of the carrier to exercise extraordinary vigilance, aided by the highest skill, and to exercise the highest degree of care, to prevent the interposition of any obstacle to expose the plaintiff to danger while waiting for the train to arrive;" and the error was not cured by a subsequent correct statement of the degree of care required. *Ibid.*

Injuries to traveler on highway.

16. In an action to recover for personal injuries occasioned by collision with a locomotive at a highway crossing, it appeared that plaintiff and a companion, driving a gentle horse used to cars, approached the track at an angle of thirty degrees; that they stopped twice to look and listen, the last time when they were about 200 feet distant, and then drove on at a moderate pace without again looking; that by turning partly around, at any point within 500 feet of the crossing, they had an unobstructed view of the track in the direction from which the train came for a distance of nine-tenths of a mile; and that plaintiff was familiar with the locality and knew that trains were liable to pass at any time. *Held*, that he was guilty of contributory negligence, as matter of law, in failing to look and listen again before crossing. *Lenz v. Whitcomb*, 310

Injuries to employees.

17. In an action against a railroad company for personal injuries sustained by an employee, a special verdict finding that the injuries were occasioned "by reason of, and as the direct consequence of," the neglect complained of, but not finding that the injury was also the *probable* consequence of such negligence, or that a person of ordinary intelligence, under the circumstances, ought reasonably to have anticipated that injury to the plaintiff would probably result therefrom, is insufficient to establish that such negligence was the *proximate cause* of the injury. *Andrews v. C., M. & St. P. R. Co.* 348

18. In an action by a helper on a switching crew to recover for injuries, received while attempting to couple a car which had been kicked down a side track upon a down grade, and alleged to have been caused by the negligence of the foreman in kicking a second car down the same track without warning so that it struck the first car before the coupling had been completed, plaintiff's evidence was to the effect that his first attempt to couple the cars had been unsuccessful, and that as the car returned after rebounding he made a second attempt without coming out from between the cars; but the evidence whether it was customary so to do was in dispute. *Held*, that a refusal to submit for special verdict the question of the existence of such custom was a material error. *Ibid.*

19. Ch. 220, Laws of 1893 (regulating the liability of railroad companies for injuries received by employees in the course of their employ-

2. In such action the testimony of plaintiff's brother-in-law that an officer having a warrant for her arrest had requested him to inform her of that fact and that she must appear before a justice of the peace at a certain time, and that he had so informed her, was admissible, in connection with other evidence (showing, among other things, that the warrant had been issued, and that she had so appeared), as tending to prove an arrest; and such evidence is *held* sufficient to sustain a finding that the prosecution against the plaintiff was actually commenced and that in pursuance thereof she submitted herself to the jurisdiction of the justice. *Ibid.*

3. Evidence in such case showing, among other things, that when plaintiff appeared before the justice the case was postponed to a certain time; that at that time the plaintiff again appeared, but no one appeared against her, and the justice said there was nothing on his docket; that the warrant was never returned; and that nothing further was ever done in the matter — is *held* sufficient to sustain a finding that the prosecution was terminated before the action therefor was commenced. *Ibid.*

4. It is no defense to an action for malicious prosecution that the complaint made by the prosecutor failed to state any offense and that the warrant issued thereon was void. *Ibid.*

5. The mere fact that a criminal prosecution was instituted for the purpose of collecting a debt will not justify a finding that there was a want of probable cause. *Lueck v. Heisler*, 87 Wis. 644, limited and explained. *Ibid.*

MANDAMUS.

See TAXATION, 5-7.

Although the granting or refusing of a writ of *mandamus* is somewhat discretionary, when it appears that the application is made to enforce a clear legal right; that the duty to be performed is plain and positive; that substantial damage will follow its nonperformance; and that there is no other adequate remedy, no laches chargeable to the applicant, and no special reason which renders a resort to the remedy inequitable, it is an abuse of discretion to refuse the writ. *Neu v. Voege*, 489

MARITIME LIENS. See LIENS, 10-14.

MARRIED WOMEN. See ATTACHMENT, 2. DEBTOR AND CREDITOR, 3. WILLS, 1, 2.

MASTER AND SERVANT.

Contract of employment: Construction: Breach.

1. Where the complaint in an action to recover damages for breach of a contract of employment alleged that the defendant hired the plaintiff "as manager of its business," and the answer admitted that he "agreed to assume charge of and to manage the defendant's business and store," the plaintiff, as matter of law, was something more than a mere manager of a store, and had some discretion as to the manner of the discharge of his duties, including the time and manner of advertising, and the employment of his time; and occasional absences while actually employed in good faith in what he deemed to be the furtherance of the interests of defendant's business would afford no ground for his discharge. *Moody v. Streissguth Clothing Co.* 202

2. The action of an employer in retaining an employee after knowledge of a breach of duty, with an admonition "not to let it happen again," is a condonation of the breach. *Ibid.*

3. In an action for wages, evidence that plaintiff had been employed by defendant "at a salary of $1,500 per annum, to begin June 1, 1889," and that he began work on that date, and continued uninterruptedly in defendant's employ until June 1, 1895, without any new contract, is *held* sufficient to require the submission to the jury of the question whether plaintiff was employed for the entire year ending June 1, 1895, at the rate of $1,500 per annum, although during that year defendant notified him that his salary had been reduced. *Dickinson v. Norwegian Plow Co.* 376

Injuries to servants: Negligence.

4. In an action by a servant to recover for injuries alleged to have been caused by a failure to furnish him a safe place in which to work, a failure to furnish the latest and most approved appliances does not constitute negligence as matter of law, the test of liability being whether the master exercised such care in that regard as men of ordinary care and prudence observe in and about their affairs, or such care as the great mass of men observe under similar circumstances. *Innes v. Milwaukee,* 170

5. Where the only negligence relied on in an action for the killing of a boiler attendant by the bursting of an elbow in a blow-off pipe was the use of a cast-iron elbow, a finding of the special verdict that it was constructed of the materials and in the manner ordinarily and usually employed in the construction of such elbows is inconsistent with findings that there was a defect or insufficiency in it which caused it to give way and burst, and that the defendant was guilty of want of ordinary care which was the proximate cause of the accident. *Ibid.*

6. In an action to recover for injuries received by a boy fifteen years old while engaged in operating a machine in defendant's factory about which he had had more or less experience, the question whether the plaintiff assumed the risks arising from defects in the machine, by continuing in the employment knowing of such defects, is *held* to have been for the jury. *Vorbrich v. Geuder & Paeschke Mfg. Co.* 277

7. Per MARSHALL, PINNEY, and NEWMAN, JJ. Although, in an action for personal injuries alleged to have been caused by the unexpected revolution of a stamping machine, operated by touching a pedal which engaged, by means of a clutch, a wheel on a revolving shaft, the testimony of the plaintiff that the machine made such an unexpected revolution the day before, and also at the time of the accident, and the testimony of another witness that he subsequently saw it do the same thing when there was no one near it, might raise a presumption of negligence as matter of law, such presumption would be overcome by conclusive proof that the machine was free from all discoverable defects. *Ibid.*

8. Unless apprised to the contrary, a master has the right to assume that a boy eighteen years of age is possessed of average intelligence for a person of his years. *Roth v. S. E. Barrett Mfg. Co.* 615

9. A boy of average intelligence, eighteen years of age, who is put at work pushing straw into a straw cutter with a stick, will be presumed, as a matter of law, to know and appreciate the danger of getting his fingers caught in the rolls and being injured thereby, and his evidence to the contrary does not raise a question for the jury. *Ibid.*

MAXIMS.
Noscitur a sociis, 673, 674.
Res ipsa loquitur, 544
MEASURE OF DAMAGES. See DAMAGES.
MECHANICS' LIENS. See LIENS, 1-7.
MILLS AND MILL-DAMS. See WATERS, 1-3.
MILWAUKEE CITY CHARTER. See TAXATION, 1. TAX TITLES, 4, 5.
MINORS. See MASTER AND SERVANT, 6, 8, 9. RAILROADS, 8.
MISTAKE. See DEEDS, 4-6. MORTGAGES, 2. TAXATION, 8.

MORTGAGES.

See CORPORATIONS, 8, 9. FIXTURES, 1. LANDLORD AND TENANT, 1, 2. LIENS, 3, 7. TENANTS IN COMMON, 2.

1. In an action to foreclose a mortgage the rendition of a personal judgment for a deficiency before the deficiency became due by the terms of the contract is a material error. *Packard v. Kinzie Ave. Heights Co.* 114
2. In a proceeding by the wife of a mortgagor to set aside the mortgage so far as it affected her dower and homestead rights in a portion of the land, she testified that she could read English print with difficulty and English script not at all; that she intended to execute the instrument, but that she had been induced by her husband to believe that the mortgage covered his store property only. The mortgage was regular upon its face, and no fraud was charged against the mortgagee. The attorney who took the wife's acknowledgment testified that he either read the mortgage to her, or asked her if she knew its contents, and she had replied that she did, basing his testimony upon the fact that he never took an acknowledgment without doing one or the other. *Held*, that a finding that the wife voluntarily executed the instrument knowing its contents should not be disturbed on appeal. *German Bank v. Muth,* 342
3. In an action to foreclose a second mortgage the owner of the first mortgage did not appear, but upon motion of the plaintiff judgment was rendered directing that the proceeds of the foreclosure sale be applied so far as necessary to pay off the first mortgage. The plaintiff bid in the premises at the sale for less than the amount due on his mortgage. The sheriff paid the net proceeds to him and he retained the same. *Held*, that a deficiency judgment against the mortgagor for the amount due on the first mortgage was erroneous. *Kasson v. Tousey,* 511
4. A mortgage while outstanding as security for the indebtedness evidenced by promissory notes, is not properly subject to conversion to the mortgagor's damage. An answer in an action on the notes which admitted the indebtedness and set up a counterclaim for the conversion of the mortgage was therefore properly stricken out as frivolous. *Wilson v. Burhans,* 550

MUNICIPAL CORPORATIONS.

Aid to railroads: Indebtedness: Constitutional law.

1. The provision of sec. 946, R. S., that the acceptance by a municipality of a proposition for subscription to the stock of a railroad

company and the issuance of bonds in payment thereof may be given by the signatures of a majority of the resident taxpayers, without a submission of the question to the electors, is valid, and such consent when so given creates a contract binding upon the municipality. *State ex rel. M., T. & W. R. Co. v. Tomahawk*, 73

2. Sec. 3, subch. IX, of the charter of the city of Tomahawk (ch. 58, Laws of 1891) provides that "no debt shall be contracted against the city . . . unless the same shall be authorized by a majority of all the members-elect of the common council," and that "the common council shall not, in any case, or under any pretext, or for any purpose whatever, contract debts or liabilities of any kind, name, or nature, exceeding the amount which it is authorized by the charter to levy for the current year." Secs. 12, 15, subch. V, provide that the council shall manage and regulate the finances and levy all taxes. Sec. 11, subch. IV, provides that, in addition to the amount of taxes for general city purposes, special taxes may be levied for certain purposes "of public utility," provided such special taxes shall first have been recommended by the council and afterwards approved by a vote of the people. Sec. 19, subch. XIII, authorizes the council to issue bonds of the city, not to exceed five per cent. of the assessed valuation, for such public improvements as shall be authorized by ordinance of the council adopted by a vote of three fourths of its members, the issuance of such bonds to be approved by a vote of the people. *Held*, that these provisions, construed together, are not at variance with, and do not by implication repeal, the general law relating to municipal aid to railroads (secs. 945 *et seq.*, R. S.),— sec. 3 of subch. IX being applicable only to debts for ordinary municipal purposes, and sec. 19, subch. XIII, being an affirmative provision merely, which does not prevent the city from exchanging its bonds for stock of a railroad company up to the prescribed limit, when a valid contract therefor is made under the general law. *Perrin v. New London*, 67 Wis. 416, distinguished. *Ibid.*

3. Although the amendment to sec. 3, art. XI, Const., limited the amount of indebtedness which a city might incur, yet the power and duty of the legislature remained to impose other restrictions or regulations; but the sufficiency of such restrictions being a question within the discretion of the legislature, its action in the premises is not reviewable by the courts. *Ibid.*

4. Under sec. 948, R. S. (providing that no corporate bonds issued in exchange for railroad stock "shall be delivered, or be valid if delivered," until the road shall have been actually completed and in operation), no indebtedness on the part of the municipality can be said to have been incurred, within the meaning of sec. 3, art. XI, Const. (prohibiting municipalities from becoming indebted in any manner in excess of five per cent. of the value of the taxable property therein, "to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness"), until the road is completed in the prescribed manner. *Ibid.*

5. The assessment intended as the basis of determining whether a municipal indebtedness is in excess of the five per cent. limit imposed by said sec. 3, art. XI, Const., is the last assessment of the municipality as equalized by the local board of review for the purposes of general taxation. *Ibid.*

6. In determining whether a proposed issue of municipal bonds is in excess of the constitutional limit of indebtedness, all forms of indebtedness must be included except warrants for money actually

4. If, however, such excess cannot be determined by computation and without proof, the court should determine the same, as near as practicable, to a reasonable certainty, from the evidence produced on the trial, and require the payment of the balance as terms of granting relief against such excess. *Ibid.*

5. Sec. 1045, R. S. (requiring the assessor to enter upon the assessment roll in regular order as to lots, blocks, etc., a correct description of each parcel of real estate in the assessment district, and providing that where land has been surveyed and platted and the plat thereof duly recorded "the assessor shall designate the several lots and subdivisions of such platted ground as they are fixed and designated by such plat"), is mandatory, and compliance therewith may be enforced by *mandamus*. *Neu v. Voege*, 489

6. The right of a person prejudiced by a noncompliance with said provisions of sec. 1045, R. S., to resort to *mandamus* is not affected by sec. 1048 (providing that when contiguous lots owned by the same person are assessed together as one parcel in violation of sec. 1045 such assessment shall not be invalid on that ground). *Ibid.*

7. The owner of a large number of tax certificates, each covering but one lot in a recorded plat, has sufficient interest in the premises to entitle him to a writ of *mandamus* to compel the assessor to list the lots separately in compliance with sec. 1045, R. S. *Ibid.*

8. A. purchased for cash from the United States a quarter section of land. The duplicate certificate of entry delivered to him described the land as the S. W. ¼ of a certain section, but the remainder of the entry papers and the patent were issued for the S. E. ¼ of the same section. The original application was lost. A. caused the duplicate certificate to be recorded, and subsequently conveyed the S. W. ¼ to a third person. The patent was received at the local land office for delivery, but has since been lost or destroyed. The S. E. ¼ was sold for taxes, and title based on the tax deeds became vested in plaintiff. Twenty-seven years after the entry A. claimed to discover that a mistake had been made in the records of the land office whereby the S. E. ¼ had been patented to him instead of the S. W. ¼, and he thereupon made an *ex parte* application to the land department, without notice to the owner of the tax title, to have it rectified, which was granted. The S. W. ¼ having, in the meantime, been patented to other parties, A. reconveyed the S. E. ¼ to the United States, and his entry money was returned and patent canceled. The defendant thereafter entered the S. E. ¼ as a homestead and took possession of the same. Plaintiff brought ejectment against him. A. died before the commencement of the action, and his testimony was not obtained. *Held:*

(1) That upon issuance of the patent to A. the entire title to the S. E. ¼ passed to him, so as to render the land subject to taxation by the state.

(2) That the action of the land department in attempting to cancel A.'s patent was unauthorized and void as to those claiming title under the tax sale.

(3) That the record of such proceedings was inadmissible to show that a mistake in A.'s entry in fact occurred.

(4) That the recording of the duplicate certificate by A., and the execution and delivery by him of a warranty deed of the S. W. ¼, were of themselves insufficient to establish such mistake.

[WINSLOW, J., dissents, being of the opinion that the title to the S. E. ¼ remained in the United States, and hence that it was never taxable.] *Miller v. Donahue*, 498

9. Certain of the sisters of a religious order organized a corporation without capital stock for the purpose of conducting and maintaining a hospital for the care of the sick of all classes. The articles of organization provided that no dividends or pecuniary profits should ever be declared to individual members, and the sisters received no compensation of any kind for their labor. When patients were able to pay, a small charge per week was made, but if they were destitute they were received and treated without pay, if there was room in the hospital. Tickets were also sold entitling the holders to admission at any time within a year. *Held*, that the corporation was a "benevolent association," within the meaning of subd. 3, sec. 1038, R. S., and its property used for hospital purposes was exempt from taxation. *St. Joseph's Hospital Asso. v. Ashland Co.* 636

10. The fact that after paying expenses and returning borrowed money there was at times a surplus which was loaned, without interest, to build other hospitals of a similar character did not show that the property was used for pecuniary profit. *Ibid.*

TAXATION of costs. See COSTS.

TAX TITLES.

See DEEDS, 5. TAXATION, 7, 8.

1. Sec. 1210*h*, S. & B. Ann. Stats. (limiting to one year from the date of the sale the time within which proceedings must be commenced to set aside any sale of lands for the nonpayment of taxes, or to cancel any tax certificate, or to restrain the issuing of any tax certificate or tax deed, for any error or defect going to the validity of the assessment and affecting the groundwork of the tax), applies to sales for street-improvement assessments and certificates issued thereon. *Levy v. Wilcox*, 127

2. The joinder of taxes, void for defects going to the validity of the assessment and affecting the groundwork thereof, with other taxes which a court of equity will require paid as terms of granting relief against the illegal taxes, will not prevent the running of the statute of limitations as to such illegal tax. *Ibid.*

3. An action to set aside an illegal special assessment for street improvements cannot be deemed commenced against the owner of the certificate of the board of public works therefor, to whom it had been transferred by the contractor, so as to stop the running of the statute of limitations as to the former, until the summons is actually served upon him, although it had been commenced against the city and the contractor before the expiration of the period of limitation. *Ibid.*

4. Under the charter of the city of Milwaukee (sec. 21, subch. V, ch. 184, Laws of 1874), providing that persons entering into contracts with the city who agree to be paid from special assessments shall have no claim upon the city in any event except from the collection of the special assessments made for the work contracted for, no action will lie against the city to recover the amount paid for a void certificate of the sale of land for the nonpayment of such an assessment. *Heller v. Milwaukee*, 134

5. The purchaser of a void certificate of the sale of land by a city for the nonpayment of assessments for local improvements is not entitled to have his money refunded by virtue of sec. 1184, R. S. (providing

for the refunding of money paid for invalid tax certificates), that section being applicable only to lands sold for the nonpayment of general taxes; nor is such right secured by sec. 4986, making the Revised Statutes apply to cities whenever applicable and not inconsistent with their charter, nor by sec. 1186, S. & B. Ann. Stats., providing for reassessment for money refunded on illegal tax deeds. *Ibid.*

6. Land was sold for the taxes of 1866 and 1868 to the county, and deeds therefor were issued to W. & P. and W. respectively, as its assignees, but it did not appear that W. was a co-tenant with P. in the ownership of the first certificate at the time the second was assigned to him, or that he was then liable, legally or equitably, for the taxes on which the second certificate was based. *Held*, that W.'s deed was not invalid because P. was his co-tenant under the first deed. *Miller v. Donahue*, 498

TENANTS IN COMMON.

See TAX TITLES, 6.

1. A tenant in common in possession who has once acknowledged his cotenant's title cannot claim to hold adversely until he has brought home to his cotenant knowledge of the adverse nature of his holding, unless his exclusive use and enjoyment has been so long continued as to justify a finding of acquiescence on the part of the other tenant. *Saladin v. Kraayvanger*, 180

2. In an action by one tenant in common against her cotenant to set aside a sale under a foreclosure judgment through which the latter had fraudulently acquired title to the common property, it appeared, among other things, that the parties were brother and sister; that the mortgage had been given by their mother, under whom they claimed, to secure the defendant's individual debt; that to defendant's knowledge plaintiff was an ignorant woman, unfamiliar with business, very poor, deserted by her husband, and living at a great distance; that no direct notice of the foreclosure was ever brought home to the plaintiff, although some mention was made of a sale about to be made; that her name had been intentionally misspelled on the copy of the summons which had been mailed to her; and that she remained in ignorance of the sale until her return, more than ten years after the execution of the deed, when she promptly asserted her rights. *Held*, that the plaintiff was not guilty of such laches as would preclude a recovery. *Ibid.*

TENDER. See DEEDS, 6. TAXATION, 3. VENDOR AND PURCHASER, 2.

TITLE to land. See ACTION, 4. BOUNDARIES. CORPORATIONS, 7–9. DEBTOR AND CREDITOR. DEEDS. EQUITY. FIXTURES. LIENS, 2, 3, 5–7. MORTGAGES. RECORDING ACTS. TAXATION, 5–8. TAX TITLES. TENANTS IN COMMON. VENDOR AND PURCHASER. WATERS. WILLS, 9.

TOMAHAWK CITY CHARTER. See MUNICIPAL CORPORATIONS, 2.

TOWNS. See HIGHWAYS, 2.

TRIAL, Place of. See CHANGE OF VENUE.

TRUSTS AND TRUSTEES. See CORPORATIONS, 6. DEBTOR AND CREDITOR, 1, 2. DEEDS, 1.

TUITION. See PUBLIC SCHOOLS.

ULTRA VIRES. See CORPORATIONS, 12–17.

VENDOR AND PURCHASER OF LAND.

See ACTION, 4. CONTRACTS, 3. CORPORATIONS, 7–9. DEBTOR AND CREDITOR. DEEDS. EQUITY. RECORDING ACTS.

1. Where a contract for the sale of land has been so far executed that a valid title to the land has been conveyed to the vendee, breach of a covenant in the deed to deliver possession of the premises on a specified day and the insolvency of one of the grantors are insufficient to warrant a rescission. *Topping v. Parish,* 378
2. C. entered into an executory contract with L. for the purchase of certain lots. Before the entire consideration was paid he sold part of the lots to R. and gave him a contract for them, receiving part cash and part notes in payment. Each note referred to the lots as the consideration. At the same time C. orally promised R. to apply his payments on the contract with L. Before maturity of the notes C. transferred his interest in both contracts to K., who agreed to carry out C.'s promise as to the application of payments. K. afterwards transferred both the contracts and the notes to N. as collateral. Upon learning of this transfer R. refused to pay the notes unless N. would agree to comply with C.'s promise. N. promised accordingly, and part of the notes were paid, but the money was not applied as agreed. *Held,* that R., as against N., had the right to have the money already paid, as well as that remaining due, applied upon C.'s contract with L., and that N. could not recover the final balance due on the notes without tendering a conveyance of the lots. *Northwestern Nat. Bank v. Ramsey,* 544
3. In an action against R. on the notes, his answer admitting the indebtedness and offering to pay the amount due upon receiving a proper conveyance raised an equitable issue only. A special verdict was therefore advisory merely, and the court should have made the usual findings, but in their absence the verdict will be treated as a finding, and judgment ordered upon it and the undisputed evidence. *Ibid.*

VENUE. See CHANGE OF VENUE.

VERDICT.

See APPEAL, 8. INSURANCE, 5. MASTER AND SERVANT, 5. RAILROADS, 11, 17, 18. VENDOR AND PURCHASER, 3. WILLS, 3.

1. The discretion of the trial court in respect to the questions to be submitted for a special verdict does not go to the extent of warranting a refusal to submit a proper question covering a material controverted fact, unless that subject is covered by other questions submitted. *F. Dohmen Co. v. Niagara Fire Ins. Co.* 38
2. It is not a prejudicial error to take a general verdict in connection with a special verdict, when the special verdict disposes of all the controverted issues. *Cooper v. Insurance Co.* 362

VOLUNTARY APPEARANCE. See GARNISHMENT.

VOLUNTARY ASSIGNMENT.

1. The court commissioner before whom the sureties on the bond of an assignee made affidavit as to their responsibility as required by sec. 1694, R. S., approved and filed the bond without signing the jurat of the affidavit. Subsequently, without obtaining leave of

court to amend the proceedings, he attached his signature while the affidavit was on file in the clerk's office. *Held*, that the assignment was void as to a creditor of the assignor who commenced garnishment proceedings before the signature was attached. *German American Bank v. Devlin.* 155

2. In a proceeding to set aside as fraudulent and void, under sec. 1693*a*, S. & B. Ann. Stats., transfers and conveyances made to a bank by its manager (who shortly thereafter made a voluntary assignment), to secure the latter's indebtedness to the bank, the evidence is *held* sufficient to sustain a finding that the bank did not know, or have reasonable cause to believe, the debtor to be insolvent at the time of the transfers. *Momsen v. Plankinton,* 166

VOLUNTARY PAYMENT. See COUNTIES, 3, 4.

WAIVER.
Of right to appeal. See APPEAL, 5.
Of irregularity in judgment. See APPEAL, 7.
Of objections to findings, etc. See APPEAL, 8.
Of lack of jurisdiction. See CHANGE OF VENUE, 1.
Of proofs of loss. See INSURANCE, 19.
Of strict performance of contract. See LANDLORD AND TENANT, 2.
Of compliance with condition precedent. See TAXATION, 1.

WARRANTY. See AGENCY, 1.

WATERCOURSES. See WATERS, 3, 4.

WATERS.

Mills and mill-dams: Reciprocal easements.

1. Where the owner of a mill-dam at the outlet of a lake has, for a length of time sufficient to give him a prescriptive right, maintained the waters of the lake at such a height that they have covered the low marshy shores and extended to the high banks, thereby rendering the adjacent lands desirable for use as summer resorts, the riparian owners, who have for the same period enjoyed the advantages of such artificial level of the waters and in reliance upon its maintenance have improved their property at great expense for the use mentioned, have on their part an easement to have the waters kept at said higher level and may prevent the lowering thereof to their injury by the owner of the dam,—at least so long as he does not abandon or surrender his easement to flood the lands. *Smith v. Youmans,* 103

[2. *It would seem* that the owner of the dam in such a case may abandon his easement of flowage so as to escape all liability *at law* for consequential damages to the owners of the flooded lands by reason of the lowering of the level of the lake, unless he is bound by law or agreement to maintain the higher level of the waters in the lake.] *Ibid.*

3. The lessee of a dam at the outlet of a lake, who is also the proprietor of another dam lower down on the stream, has no other or greater rights than his lessor in respect to lowering the level of the waters of the lake. *Ibid.*

Lake or watercourse? Fishing and hunting.

4. By the expansion of a small stream a shallow body of water from thirty-five to sixty-five rods in width and about three miles long was formed, through which there was little or no current during the greater part of the year. In summer the rushes and wild rice

grew luxuriantly and the surface was interspersed with mud, marsh, and bog, leaving small openings of clear water but no regular channel. In ordinary stages of water it was navigable only by small canoes and skiffs. It had been meandered by the government surveyors, and was referred to in the field notes as a "lake" or "marsh." *Held*, that it was not a watercourse but a lake, and hence that the title of the riparian owners stopped at the water line. *Ne-pee-nauk Club v. Wilson*, 290

5. Riparian owners upon a lake, the soil under which belongs to the state, have no exclusive right to hunt and fish upon its waters. *Ibid.*

Surface waters: Accumulation: Negligence: Railroads.

6. Where the owner of land permits surface waters to accumulate thereon he must either confine them or transmit them to adjacent lands in such a manner as to cause no material injury thereto; and if they escape through his negligence he is liable for injury occasioned thereby. *Borchsenius v. C., St. P., M. & O. R. Co.* 448

7. In an action against a railroad company for an injury to land occasioned by accumulated surface water breaking through its roadbed, mere failure of the company to construct culverts or drains to permit the passage of surface water from the upper to the lower side cannot be imputed as negligence, unless such disposition of the water would have been in substantial accord with its natural flow. *Ibid.*

8. Where a railroad company constructs a roadbed which it could foresee would act as a dam to obstruct the passage of surface water, it is its duty to construct it at such a place and in such a manner as to withstand the waters which would accumulate against it in all ordinary storms, so as to guard against all damages, which could be reasonably foreseen, to lower proprietors. *Ibid.*

9. A complaint in such a case alleging that plaintiff's damage "was caused solely by the negligent and unskilful manner in which said roadbed was constructed, and by the obstruction of the natural drains occasioned through the negligence and carelessness of said defendant in the construction of said roadbed," is *held* sufficient, as against a general demurrer, to show that defendant had failed in such duty. *Ibid.*

WILLS.

1. The wife of the executor of a will is a competent witness thereto, since the executor, as such, takes no beneficial interest under the will. *In re Will of Lyon*, 389

2. The marriage of a woman does not revoke a will previously made by her, the common-law rule in that regard having been changed by the statutory removal of her disabilities in respect to the disposition of her property. *Ibid.*

3. In a proceeding in the circuit court to probate a will errors of the trial court in instructing the jury and in exerting undue pressure to secure an agreement, are not material, the proceeding being equitable and the verdict advisory merely. *Jones v. Roberts*, 427

4. A finding of fact that a testatrix was mentally competent at the time of the execution of a will will not be disturbed as against the preponderance of the evidence because contrary to the testimony of a large number of experts and non-experts that she was of unsound mind, where there was credible evidence respecting

her actions before, at the time, and after, the will was executed, indicating that she fully comprehended what she was doing when she made it, and that her acts were uninfluenced by any person; it being the province of the court or jury to give such opinion evidence so much weight only as they may conclude it to be entitled to, or to reject it altogether. *Ibid.*

5. Where a person signs his will by making his mark, and it is otherwise properly executed, it may be established, even when contested, by the evidence of one subscribing witness and the testimony that the other actually signed as such, together with corroborating evidence sufficient to satisfy the court of all the statutory requisites, if the absence of the witness not produced is satisfactorily accounted for. *Ibid.*

6. The proper practice to secure the modification of a judgment in a contested will case so as to make the costs payable out of the estate is by motion for that purpose and not by motion for a rehearing. *Ibid.*

7. Where the contestant of a will has acted in good faith in taking an appeal to the supreme court, and the questions of law or fact involved are worthy of consideration, the court will order the costs taxed against him on the appeal to be paid out of the estate. *Ibid.*

8. Sec. 4041*a*, S. & B. Ann. Stats. (prohibiting the payment of the costs of an unsuccessful contestant out of the estate, except in certain cases), is applicable only to costs in the county and circuit courts. *Ibid.*

9. To a will bequeathing all the testator's estate to his wife and appointing her guardian of his son and executrix, there was added, just before the signature, the words "but if one or the other dies, the one that survives the other, take it all." *Held*, that the widow took a life estate which would merge into a fee in case she survived the son, with remainder to the son in case he survived her. *Lovass v. Olson*, 92 Wis. 616, distinguished. *Littlewood's Will*, 608.

WITNESSES. See EVIDENCE, 1. INSTRUCTIONS TO JURY, 1, 2. WILLS, 1.

WORDS AND PHRASES.

Assessment for state and county taxes, in constitution. See MUNICIPAL CORPORATIONS, 5.
Benevolent association, in statute. See TAXATION, 9, 10.
Claim or demand of any kind or character whatsoever, in statute. See MUNICIPAL CORPORATIONS, 9.
Connected with the subject of the action, in statute. See PLEADING, 1.
Conveyance, in statute. See RECORDING ACTS.
Costs, in judgment. See COSTS, 2.
Cruel and inhuman treatment, in statute. See DIVORCE, 1.
Day, in contract. See CORPORATIONS, 7.
On *deposit*, in statute. See CRIMINAL LAW, 1, 2.
Due process of law, in constitution. See GAMBLING, 4.
Expulsion of pupil. See PUBLIC SCHOOLS, 1.
Filing, in statute. See CORPORATIONS, 1.
Fraud, in policy. See INSURANCE, 16.
Incur indebtedness, in constitution. See MUNICIPAL CORPORATIONS, 4.
Injunction, in statute. See APPEAL, 2.
Intentional injuries, in policy. See INSURANCE, 9.
Relation of *landlord and tenant*, in statute. See LIENS, 6.
Lumberman in woods, in policy. See INSURANCE, 4.
Mill owner, overseeing only, in policy. See INSURANCE, 4.
Operating, running, etc., trains or cars, in statute. See RAILROADS, 20.

Originates subsequent to the commencement of the construction of a building, in statute. See LIENS, 3.
Other purposes, in statute. See CRIMINAL LAW, 7.
Personal estates, in statute. See ACTION, 1.
Principal contractor, in statute. See LIENS, 1.
Purchaser in good faith, in statute. See LIENS, 2. RECORDING ACTS.
Supervising, in policy. See INSURANCE, 2.
Taxes, in statute. See TAX TITLES, 1.

WRIT.

Of attachment. See ATTACHMENT, 3.
Of error.
The mere fact that an aggrieved party has been given an adequate remedy by appeal to the supreme court does not deprive him of the right to have the proceedings reviewed by that court on writ of error, under sec. 21, art. I, Const. *Baier v. Schermerhorn*, 372
Of execution. See COURTS, 3. PROCESS.
Of injunction. See APPEAL, 2. COUNTIES, 1.
Of mandamus. See MANDAMUS. TAXATION, 5–7.
Of replevin. See LIENS, 11, 14.

Ex. G.M.B.

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